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IN THE
Supreme Court of the United States
OCTOBER TERM, :995

COUNTY OF KERN and CARL SPARKS, Sheriff,
Petitioners,
vs.
JERRY ANDERSON, GLENNA BLAIR,
TERRY DAVIS, JOHN WARDWELL,
JESSE VASQUEZ, and IRENE JUAREZ,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do jail conditions violate the Fourteenth Amendment absent a finding that correctional officials acted with a deliberately indifferent state of mind?

2. Must the Circuit Court review findings which create attorney fee liability in the absence of an enforceable order?

3. Can the Circuit Court award catalyst fees for a jail procedure change without determining if the challenged procedure was unconstitutional?

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COUNTY OF KERN and CARL SPARKS, Sheriff,
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vs.
JERRY ANDERSON, GLENNA BLAIR,
TERRY DAVIS, JOHN WARDWELL,
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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners[1] hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 45 F.3d 1310 (9th Cir.1995). (Appendix A.) The decision was amended by addition of footnote in the denial of respondents' motion for rehearing filed July 7, 1995. (Appendix B.)

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[1] All parties are listed in the caption to this Petition.

JURISDICTION

The final judgment of the court of appeals was entered January 13, 1995. Petitioners' motion for rehearing was denied on May 19, 1995. (Appendix C.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983 (Appendix F).
2. 42 U.S.C. § 1988 (Appendix F).

STATEMENT OF THE CASE

Petitioners, the County of Kern and Sheriff Carl Sparks, operate a short-term county jail facility which houses pretrial detainees and sentenced county prisoners. Inmates brought a class action under 42 U.S.C. § 1988, alleging approximately forty unconstitutional jail conditions. Some issues were resolved by motion or stipulated settlement. The remainder of the case was tried by a magistrate judge who issued findings and recommendations. (Appendix D.) The District Court adopted the findings of the magistrate judge (Appendix E), and both parties appealed. This petition for writ follows only as to the decision of the Ninth Circuit Court of Appeals, Section III, Non-Inmate Translators for Medical Interviews, and Section IV, Dental and Vision Care.

Non-Inmate Translators for Medical Interviews. The decision below relied upon a Seventh Circuit ruling that failure to provide translators for medical interviews could constitute deliberate indifference to a serious medical need in violation of the Eighth Amendment. However, there was no finding by the district court that

the County actually failed to provide a translator. The jail's written policy specified that medical staff or correctional staff would translate and the only factual finding was that inmate translators were sometimes used.[2] The Court of Appeals found that inmate translation was inappropriate and potentially inaccurate, but it upheld the District Court's order that inmates may translate for each other unless they request a staff translator. There was no finding made by either the District Court or the Court of Appeals as to whether the occasional use of inmate translators was an Eighth or Fourteenth Amendment violation, and no finding regarding the state of mind of the correctional officials who established this procedure.

Dental and Vision Care. The District Court adopted the magistrate judge's findings regarding the provision of dental and vision care. The magistrate judge expressly found that the level of vision care services offered inmates was unconstitutional, [3] and implied that the previous level of dental care was unconstitutional.[4] Again, there was no finding as to whether there was an Eighth or Fourteenth Amendment violation, and there was no finding regarding the state of mind of the correctional officials.

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[2] Appendix D, "Findings and Recommendations," p. 48. ". . . if an inmate presented at sick call and could not speak English, she would either have a custodial officer or nurse translate, if possible, or would have the officer bring a bilingual inmate to translate. In some cases, she testified, the inmate would choose his own inmate translator; the clear implication was that, in the remaining instances, the inmate translator was chosen for the inmate seeking medical care. RT 4/9/91: 71 at 22-25, 72."

[3] Appendix D, "Findings and Recommendations," page 21, lns. 12-14.

[4] Appendix D, "Findings and Recommendations," page 16.

The District Court did not issue orders as to dental or vision care services, as it found that during the course of the proceedings the County had increased the level of services to constitutionally adequate standards. The County appealed the findings and recommendations of the magistrate judge as adopted by the District Court because they were the basis for an award of attorney fees as a "catalyst" for change under 42 U.S.C. § 1988.

The Ninth Circuit held that the County has no standing to raise the issue because the District Court did not grant injunctive relief. The Ninth Circuit further advised that the matter should be considered by the District Court in the ancillary proceedings regarding attorney fees.

REASONS FOR GRANTING THE WRIT

1. A significant and recurring issue is raised as to whether the "deliberate indifference" standard is different for Eighth and Fourteenth Amendment claims brought by incarcerated inmates. There are conflicts within the Courts of Appeals, and the issue is ripe for review.

The Ninth Circuit's ruling concerning provisions for translators in the Kern County Jail found deliberate indifference without requiring a state of mind inquiry. This analysis conflicts with the holdings of the other Circuit Courts and is in conflict with previous decisions of this court.

Attacks upon conditions of confinement, including the adequacy of food, shelter, safety, and medical care are regularly brought in individual and class action jail litigation. The requirement of an objective analysis of

conditions of confinement in a jail as part of a Fourteenth Amendment claim was first established by the Court in *Bell v. Wolfish*, 441 U.S. 520 (1979). Conditions or restrictions must amount to arbitrary or purposeless punishment, which presumably requires at least a deliberately indifferent state of mind. *Bell v, Wolfish*, 441 U.S. 520, 538-539. More than mere negligence is specifically required to invoke the protection of the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986).

Subsequently, this Court has held that prisoners who challenge conditions of confinement under the Eighth Amendment must demonstrate both an objective deprivation so serious as to rise to the level of a constitutional violation and a subjective "deliberately indifferent" state of mind. *Wilson v. Seiter*, 501 U.S. 294 (1991), *Farmer v. Brennan*, ___U.S.___, 114 S.Ct. 1970 (1994). This Court has not directly addressed the issue of whether a state of mind finding of at least deliberate indifference is required to prove an unconstitutional condition of confinement under the Fourteenth Amendment.

Throughout the circuits, numerous decisions after *Wilson v. Seiter*, 501 U.S. 294 (1991) have applied a state of mind requirement to Fourteenth Amendment challenges. *Manarite v. City of Springfield*, 957 F.2d 953, 955-956 (1st Cir. 1992); *Kost v. Kozakiewicz*, 1 F.3d 176, 187-188 (3rd Cir. 1993); *Alberti v. Sheriff of Harris County, Tex.*, 937 F.2d 984, 998-1000 (5th Cir. 1991); *Barber v. City of Salem, Ohio*, 953 F.2d 232, 238 (6th Cir. 1992); *Pacelli v. deVito*, 972 F.2d 871, 875-876 (7th Cir. 1992); *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991); *Rubeck v. Sheriff of Wabash County*, 824 F.Supp 1291, 1296 (N.D. Ind. 1993). The failure of the Ninth Circuit to require findings that jail officials acted with a deliberately indifferent state of mind in the occasional use of inmate translators is in conflict with

these decisions and raises a significant question that is ripe for review.

2. A significant and recurring issue is raised as to County's due process right to challenge findings which create "catalyst" attorney fees.

The magistrate judge's findings regarding dental and vision care cited above created the basis for a "catalyst" fee claim. The right of appeal turns on whether there is some threatened or actual injury that is both real and immediate. *O'Shea v. Littleton*, 414 U.S. 488, 495-498 (1974). In 1983 actions, a claim for attorney fees under 42 U.S.C. § 1988 meets this qualification. Plaintiffs were in fact awarded fees as catalyst for dental and vision care changes.

The Ninth Circuit's reliance on *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 633 (9th Cir. 1992) is incorrect and in variance with *O'Shea*. Unlike *Native Village of Tyonek*, the court in *Anderson* granted injunctive relief and issued findings and recommendations which became the basis of an attorney fee award. If the County of Kern cannot appeal the correctness of those underlying findings, then petitioner is left without legal recourse to challenge the basis for an award of fees.

3. The Circuit Court's refusal to Review the District Court's dental and vision care findings conflicts with *Farrar v. Hobby*.

The County requested that the Ninth Circuit review the District Court's findings concerning the dental and vision care provided to inmates. The County contended

that at all stages of this litigation, the level of care provided met constitutional standards. The decision below declined to review those findings, holding instead that such a review is applicable only during ancillary attorney fee proceedings. However, in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), this court stated that "A request for attorney's fees should not result in a second major litigation." The substantive issues, including the correctness of findings, must be resolved as part of the substantive case, and not simply deferred to the ancillary attorney fees hearing.

Further, the Ninth Circuit standard for ancillary attorney fee proceedings is that the party moving for fees does not need to establish that any unconstitutional problem ever existed, only that its original claim was not "frivolous, unreasonable or groundless." *Rock Creek Ltd. Partnership v. State Water Resources Control Board*, 972 F.2d 274 (9th Cir. 1992).

Underlying the catalyst theory is the basic assumption that the challenged conduct or condition has changed from unconstitutional to constitutional. Otherwise, governmental entities are unable to implement administrative changes to jail conditions during the course of litigation without being liable for attorney fees. A claim that the level of vision care offered to county jail inmates is unconstitutional may very well not be "frivolous," yet not rise to the level of a constitutional violation. A finding that the previous condition is unconstitutional must be made, and it must be appealable under the same standards that apply to any finding that a condition of confinement is unconstitutional.

The decision below and the two Ninth Circuit cases cited conflict with *Farrar v. Hobby*, __ U.S. __, 113 S.Ct. 566 (1992) which requires a change in the legal relationship between the parties before an award of attorney fees is appropriate. The decision below also

conflicts with the post *Farrar* decision of the Fourth Circuit, *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: August 16, 1995.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERRY ANDERSON; GLENNA BLAIR; TERRY DAVIS; JOHN WARDWELL; JESSE VASQUEZ; IRENE JAREZ;
Plaintiffs-Appellees-Cross-Appellants,

v.

COUNTY OF KERN; JOHN SMITH, Sheriff,
Defendants-Appellants-Cross-Appellees.

Nos. 92-17040
93-15019

D.C. No.
CV-90-00205-GEB

OPINION

Appeals from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Argued and Submitted
March 15, 1994—San Francisco, California*

Filed January 13, 1995

Before: Cecil F. Poole, William C. Canby, Jr.,
and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Poole

*The motion of the California Board of Corrections to file an amicus curiae brief is granted.

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Thomas E. McConnell, California Board of Corrections, Sacramento, California, for California Board of Corrections as amicus curiae.

OPINION

POOLE, Circuit Judge:

In this 42 U.S.C. § 1983 action, the district court entered a permanent injunction in favor of inmates at five Kern County jails. The inmates, who are pretrial detainees and convicted prisoners, appeal the district court's refusal to enjoin prison officials from placing mentally disturbed or suicidal prisoners in safety cells. The county defendants cross-appeal the district court's (1) injunction requiring prison officials to develop a policy regarding joint exercise and day room access for prisoners in administrative segregation, (2) injunction requiring prison officials to provide non-inmate translators for Spanish-speaking inmates seeking medical care, and (3) holding that their former dental and vision care policies were inadequate. We affirm in part and reverse in part.

I

Safety Cells

The inmates contend that the district court should have enjoined as unconstitutional Kern County's use of safety cells for suicidal and mentally disturbed inmates. Safety cells are padded cells that are used to temporarily confine violent or suicidal prisoners so they cannot hurt themselves.

The convicted inmates' challenge is evaluated under the Eighth Amendment, and the pretrial detainees' challenge is evaluated under the Fourteenth Amendment. *Redman v. County of San Diego*, 942 F.2d 1435, 1440 (9th Cir.) (en banc), *cert. denied*, 112 S. Ct. 1435 (1991). Under the Eighth Amendment, the pertinent inquiry is (1) whether placement of mentally disturbed or suicidal inmates in safety cells constitutes an infliction of pain or a deprivation of the basic human needs, such as adequate food, clothing, shelter, sanitation, and medical care, and (2) if so, whether prison officials acted with the requisite culpable intent such that the infliction of pain is "unnecessary and wanton." *Farmer v. Brennan*, 114 S. Ct. 1970, 1977 (1994). In prison conditions cases, prison officials act with the requisite culpable intent when they act with deliberate indifference to the inmates' suffering. *Id.*; *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991); *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc). Similarly, the placement of pretrial detainees in safety cells is "punishment" in violation of the Fourteenth Amendment only if prison officials act with deliberate indifference to the inmates' needs. *Redman*, 942 F.2d at 1441-43; *Hallstrom v. Garden City*, 991 F.2d 1473, 1485 (9th Cir.) (applying *Redman* to conditions of confinement claim), *cert. denied*, 114 S. Ct. 549 (1993).

The test for whether a prison official acts with deliberate indifference is a subjective one: the official must "know[ ] of and disregard[ ] an excessive risk to inmate health and safety; the official must both be aware of the facts from which the

inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 114 S. Ct. at 1979.

The parties proffered the following evidence.

Kern County currently has one safety cell in use.[1] It is approximately 10 feet by 10 feet, is covered with a rubberized foam padding, and has a pit toilet with a grate. If inmates are in the cell at mealtime, they eat their meals there.

Sergeant Bradley, a supervisor, estimated that 40% of the prisoners placed into the safety cell were suicidal. Inmates that are placed on suicide watch in the cell are given paper clothing so that they cannot hang themselves with their regular clothing. Sometimes the inmates destroy this paper clothing and thus are naked or clad only in their underwear. According to Sergeant Bradley, inmates placed in the safety cell are always given at least paper clothing and are not put naked into the cell. One inmate testified that she was placed naked into the cell because she threatened to choke herself with the paper clothing.

If inmates are violent, they may be shackled to the grate over the pit toilet. According to one nurse, chaining did not happen frequently. According to Sergeant Bradley, during the period July 1987 to January 1991 he observed approximately ten instances of an inmate shackled with handcuffs attached to a waist chain, leg irons separated with a 12-inch chain, and secondary chains attached from the leg irons to the toilet grate. A supervising nurse testified that sometimes "the kindest thing to do was to restrain [certain inmates] . . . to prevent them from hurting themselves. . . . I've seen inmates bang their heads on the wall [and] . . . on the grate in the safety cell since that was the only metal part in there."

[1]It had a second, virtually identical, cell in use at the time of the trial.

Inmates and prison officials testified about three inmates' experiences in the safety cell. One inmate was placed in the safety cell on several occasions, once after he tried to kill himself and twice after he became violent. On the occasion he tried to kill himself, he was shackled all night to the toilet grate with leather restraints and was given only a paper shirt that prison officials placed over his lap. Another inmate, who was placed in the cell for about three hours after she threatened suicide, was shackled to the grate. A third inmate testified that after he told a deputy that he was thinking about hurting himself, he was placed without restraints into the safety cell for about an hour and a half, which made him feel "awful", "depressed", "claustrophobic", and "degraded." The inmates testified that the cell was dark, scary, and smelled bad, and that the pit toilet was encrusted with excrement and urine.

Dr. Rundle, the plaintiffs' expert witness, testified that the cell was small, dark, dingy, and scary. He also testified that these conditions would be psychologically damaging to anyone and would be particularly damaging to mentally disturbed and suicidal inmates left alone in the cell. He opined that it was inappropriate to secure any prisoner to the toilet grate, but he later testified that it would not be inappropriate to restrain violent prisoners in this manner.

A prison administrator from King County, Washington testified that most prisons attach a device to the wall for shackling in lieu of shackling prisoners to the toilet grate. A former administrator with the Federal Bureau of Prisons testified that safety cells in federal prison have a bed, a stainless steel commode, and a wash basin.

Evidence was presented regarding the monitoring of the safety cell. California Code of Regulations title 15, section 1055 provides that an inmate

> shall be placed in a safety cell only with the approval of the facility manager or the watch commander and

> continued retention in such a cell shall be reviewed a minimum of every eight hours. A medical/mental health opinion on placement and retentions shall be secured within 24 hours of placement in such a cell or at the next daily sick call, whichever is earliest, and the inmate shall be medically cleared for continued retention every 24 hours thereafter. Intermittent direct visual supervision shall be provided every half hour.

In addition to section 1055's procedures, nursing staff does a screening within 30 minutes after an inmate is placed in the cell, the inmate is checked visually every 15 to 30 minutes, and the shift supervisor reviews the safety cell placement every 4 hours.

On the basis of this evidence, the district court rejected the inmates' challenge to the use of safety cells, finding that nothing suggested that "the safety cells had been inappropriately used as more than a temporary measure to control violent inmates until they 'cooled down' sufficiently to be released from those cells. The experts . . . agreed that the cells could appropriately be used for this purpose." The district court also held that the plaintiffs failed to show that Kern County had an inadequate program for identifying, treating, and supervising suicidal inmates.[2]

[1] We affirm the district court's holding. The safety cell is admittedly a very severe environment, but it is employed in response to very severe safety concerns. There was ample testimony that some prisoners became so violent and such a danger to themselves that temporary placement in a safety cell was needed in order to deprive the prisoners of all means of

[2]Although the plaintiffs challenged the adequacy of the mental health care program generally in the district court, they specifically did not appeal this issue but argue only that the use of safety cells for mentally ill and suicidal prisoners is unconstitutional.

harming themselves. The fact that some prisoners who are violent or threaten violence to themselves or others may be mentally disturbed or suicidal does not detract from the need. There was testimony that sinks, stand-up toilets, and beds can be and have been used by prisoners to harm themselves by banging against them or by other means. Deprivation of these articles for short periods of time during violent episodes is constitutionally justifiable. There was sufficient evidence to support the district court's factual finding that the safety cell was used to control violent inmates, and that the inmates were confined to the safety cell only for short periods of time. *See Hoptowit v. Ray*, 682 F.2d 1237, 1258 (9th Cir. 1982) (in evaluating challenges to conditions of confinement, court may consider the length of time the prisoner must go without basic human needs). The district court therefore did not err in refusing to enjoin the County from ever making use of a safety cell for mentally disturbed or suicidal prisoners.

There was testimony from some plaintiffs that the cell was dirty and smelled bad. Unquestionably, subjection of a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment. *See, e.g., Gee v. Estes*, 829 F.2d 1005, 1006 (10th Cir. 1987) (Eighth Amendment claim established by allegations that prisoner was placed naked in a lice-infested cell with no blankets in below forty-degree temperatures, denied food or served dirty food, and left with his head in excrement while having a seizure); *McCray v. Burrell*, 516 F.2d 357, 366-69 (4th Cir. 1974) (prisoner placed naked in bare, concrete, "mental observation" cell with excrement-encrusted pit toilet for 48 hours after he allegedly set fire to his cell; prisoner had no bedding, sink, washing facilities, or personal hygiene items, and he was not seen by a doctor until after he was released), *cert. denied*, 426 U.S. 471 (1976); *Gates v. Collier*, 501 F.2d 1291, 1302 (5th Cir. 1974) (punishment of prisoner by confinement in small, dirty cell without light, hygienic materials, adequate food, heat; prisoner also was punished through administration of milk of magnesia);

LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) (prisoner confined for five days in strip cell with only a pit toilet and without light, a sink, or other washing facilities), *cert. denied*, 414 U.S. 878 (1973).

[2] The plaintiffs here have not shown, however, that the sanitary limitations imposed upon them were more than temporary. More important, they have not shown why possible sanitation problems required that the County be enjoined permanently from *ever* making *any* use, however temporary, of a safety cell for mentally disturbed or suicidal prisoners. That a safety cell needs more frequent cleaning, or that its toilet needs more frequent flushing, does not establish that the cell must never be used at all.

[3] In addition to their failure to establish that temporary imposition of the conditions of the cell constituted an "infliction of pain" in violation of the first part of the *Farmer* test, the plaintiffs also have not satisfied the second part of the test: prison officials' deliberate indifference to the inmates' suffering. *Farmer*, 114 S. Ct. at 1977. Prison officials have to have some means of controlling violent or self-destructive inmates temporarily until the episode passes, and as the plaintiffs' own expert testified, it is difficult to distinguish between violent, mentally healthy inmates and violent, mentally disturbed ones. Similarly, in an emergency, prison officials are not culpable when they put an inmate who imminently threatens or attempts suicide temporarily in a place where he cannot hurt himself. In light of the safety concerns underlying use of the safety cell, the plaintiffs' evidence is not sufficient to compel an inference that the defendants are "knowingly and unreasonably disregarding an objectively intolerable risk of harm" and will continue to do so in the future. *Id.* at 1983. The plaintiffs accordingly have failed to establish the subjective as well as the objective components of an Eighth Amendment prison conditions claim for injunctive relief. *See id.* We therefore affirm the district court's refusal to enjoin the use of the safety cell.

II

Joint Exercise for Inmates in Administrative Segregation

The defendants contend that the district court erred by ordering them to develop a policy allowing prison officials to exercise discretion to determine whether certain prisoners housed in administrative segregation can safely exercise or have dayroom access together.

"[T]he transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Hewitt v. Helms*, 459 U.S. 460, 468 (1983). Thus, the hardship associated with administrative segregation, such as loss of recreational and rehabilitative programs or confinement to one's cell for a lengthy period of time, does not violate the due process clause because there is no liberty interest in remaining in the general population. *Touissaint v. McCarthy*, 801 F.2d 1080, 1091-92 (9th Cir. 1986) (applying *Hewitt v. Helms*), *cert. denied*, 481 U.S. 1069 (1987).

Kern County has various classes of prisoners in administrative segregation, including inmates (such as former police officers, former correctional officers, and persons accused of notorious crimes) who might be subject to attack by other inmates, other protective custody inmates, security risk inmates, combined protective custody-security risk inmates, and general population inmates who require temporary administrative segregation. A prison official testified that administrative segregation was a last resort for

> people who either, for their own safety or safety of other inmates, cannot be around one other person without direct absolute control of their movement and behavior. And that even means being out in the dayroom with other folks, even one other person.

> The potential could be there that they can either be harmed or they're going to harm someone else.

Inmates in administrative segregation retain all inmate privileges such as family visits, telephone access, and exercise. They are all single-celled, however, and have no contact with any other inmate, either for exercise, day room access, or otherwise. The inmates presented some evidence that isolation has adverse effect upon the inmates.

[4] Here, the inmates contend that a policy that does not give prison officials discretion to allow certain ad seg inmates to exercise or use the day room together constitutes deliberate indifference to the inmates' needs. This contention fails.

First, as this court held in *Touissaint*, administrative segregation, even in a single cell for twenty-three hours a day, is within the terms of confinement ordinarily contemplated by a sentence. 801 F.2d at 1091-92.

Second, prison officials have a legitimate penological interest in administrative segregation, and they must be given "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. 520, 546-47 (1979); *see Turner v. Safley*, 482 U.S. 78, 87-91 (1987); *Michenfelder v. Sumner*, 860 F.2d 328, 331 & n.1 (9th Cir. 1991) (*Turner* factors may be instructive in contexts other than the First Amendment).

[5] Confinement in a cell for most of the day is not pleasant. And the relief ordered by the district court was extremely reasonable and deferential to prison officials. These factors make it somewhat difficult to reverse the district court's injunction. But the confinement at issue here does not rise to the level of deliberate indifference. As this court observed in *Wright v. Rushen*, "[c]ourts must diligently ensure compliance

with constitutional requirements and with statutes designed to improve prison conditions. But courts may not institute reform programs on their own under the guise of correcting cruel and unusual punishment." 642 F.2d 1129, 1135 (9th Cir. 1981).

[6] Accordingly, we hold that the district court erred by finding a constitutional violation and by ordering injunctive relief.

III

Non-Inmate Translators for Medical Interviews

The defendants contend that the district court erred by ordering them to provide a Kern County employee, preferably a member of the medical staff, to translate for Spanish-speaking inmates who request a translator during medical and mental health interviews.

Jail officials violate a prisoner's Eighth Amendment rights if they are deliberately indifferent to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (same standard applies to pretrial detainees). The indifference to medical needs must be substantial; a constitutional violation is not established by negligence or "an inadvertent failure to provide adequate medical care." *Estelle*, 429 U.S. at 105-06.

The Ninth Circuit has not ruled on the issue of whether failure to provide translators can constitute deliberate indifference. The Seventh Circuit has held that it can:

> An impenetrable language barrier between doctor and patient can readily lead to misdiagnoses and therefore pain and suffering. This type of language problem which is uncorrected over a long period of time and as to which there is no prospect of allevia-

> tion, can contribute to unconstitutional deficiencies in medical care.

Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).

[7] Here, the district court ordered only that a non-inmate translator, preferably a member of the medical staff, be made available upon an inmate's request. This is consistent with the jail's existing written policy that a medical staff member will translate, and, if a medical staff member is not available, a member of the correctional staff will translate. Inmate translators can still be used unless an inmate requests a staff member. The testimony was undisputed that inmate translation was inappropriate and potentially inaccurate, and even the nursing supervisor admitted she preferred non-inmate translators. Finally, there are nine members of the jail staff who are fluent in Spanish, and seven more speak some Spanish. The district court did not abuse its discretion. *See LeMaire v. Maass*, 12 F.3d 1444, 1451 (9th Cir. 1993) (a district court has broad discretion to fashion remedies once a constitutional violation is found).

IV

Dental and Vision Care

The defendants contend that the district court erred by holding that the jail's former dental and vision care policies were constitutionally inadequate. The plaintiffs argue persuasively that the defendants have no standing to raise this issue because the district court did not grant injunctive relief. *See Native Village of Tyonek v. Puckett*, 957 F.2d 631, 633 (9th Cir. 1992). The district court did not grant injunctive relief to the plaintiffs because the defendants changed their policies during the litigation, thereby mooting the plaintiffs' claims.[3]

[3]The defendants advised the district court that they revised the policies in their post-trial brief.

The defendants nevertheless argue that the panel should consider the issue because it affects the attorneys' fees that the plaintiffs may recover. The issue is an interesting one: if the defendants revised their policy in response to the plaintiffs' civil rights action, thus mooting the plaintiffs' claim, are the plaintiffs nonetheless prevailing parties entitled to recover fees under 42 U.S.C. § 1988? However interesting the issue, it is not ripe. It should be considered by the district court in the ancillary proceedings regarding attorneys' fees.

AFFIRMED in part and REVERSED AND REMANDED in part.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

- - - - - - - - - -

NO. 92-17040
CT/AG#: CV-90-00205-GEB (JFM)

FILED
JUL 19 12 40 PM '95
Clerk, U.S. District Court
Eastern District of California
By /s/ RM Deputy Clerk

JERRY ANDERSON; GLENNA BLAIR;
TERRY DAVIS; JOHN WARDWELL,
JESSE VASQUEZ; IRENE JAREZ
Plaintiffs - Appellees

v.

COUNTY OF KERN; JOHN SMITH, Sheriff
Defendants - Appellants

CALIFORNIA BOARD OF CORRECTIONS, amicus
Amicus

No. 93-15019
CT/AG#: CV-90-00205-GEB

JERRY ANDERSON; GLENNA BLAIR;
TERRY DAVIS; JOHN WARDWELL,
JESSE VASQUEZ; IRENE JUAREZ;
Plaintiffs - Appellees/Cross - Appellants

v.

COUNTY OF KERN; JOHN SMITH, Sheriff
Defendants - Appellants/Cross - Appellees

APPEAL FROM the United States District Court for the Easter District of California (Fresno).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Fresno) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part and REVERSED AND REMANDED in part.

Filed and entered January 13, 1995
Amended by order filed July 7, 1995

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
/s/ Muller
JUL 17 1995
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 7 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JERRY ANDERSON; GLENNA BLAIR;
TERRY DAVIS; JOHN WARDWELL,
JESSE VASQUEZ; IRENE JAREZ;
Plaintiffs-Appellants-
Cross-Appellees,

v.

COUNTY OF KERN; JOHN SMITH, Sheriff,
Defendants-Appellees-
Cross-Appellants.

No. 92-17040
No. 93-15019
D.C. No. CV-90-00205-GEB

ORDER

Before: POOLE, CANBY, and RYMER,
Circuit Judges.

The panel has voted to deny plaintiffs-appellants-cross appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

Plaintiffs-appellants-cross appellees' petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The opinion filed January 13, 1995 is amended to include the following footnote at the end of the second paragraph of Section I, at page 505 of the slip opinion and 45 F.3d 1310, 1313:

> We need not decide here whether, under some circumstances, the "deliberate indifference" standards under the Eighth and Fourteenth Amendments diverge. *See Redman v. County of San Diego*, 942 F.2d 1435, 1442-43 (9th Cir. 1991) (en banc). The plaintiffs did not differentiate between the two standards in their briefs, and emphasized the Eighth Amendment formulation, which we apply in this opinion. We are convinced that any possible divergence would not have affected the outcome of our decision.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
/s/ Muller
Deputy Clerk
JUL 17 1995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAY 19 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JERRY ANDERSON; GLENNA BLAIR;
TERRY DAVIS; JOHN WARDWELL,
JESSE VASQUEZ; IRENE JAREZ;
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Cross-Appellees,

v.

COUNTY OF KERN; JOHN SMITH, Sheriff,
Defendants-Appellees-
Cross-Appellants.

No. 92-17040
No. 93-15019
D.C. No. CV-90-00205-GEB

ORDER

Before: POOLE, CANBY, and RYMER,
Circuit Judges.

The panel has voted to deny defendants-appellees-cross appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. R. 35.

Defendants-appellees-cross appellants' petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

FILED
MAR 20 1992
Clerk, U.S. District Court
Eastern District of California
By /s/ CAF Deputy Clerk

JERRY ANDERSON, et al.,
Plaintiffs,

vs.

COUNTY OF KERN, et al.,
Defendants.

No. CIV F-90-0205 REC JFM P

FINDINGS AND RECOMMENDATIONS

I. PROCEDURAL HISTORY

This is a class action suit brought pursuant to 28 U.S.C. § 1983 by the inmates of five Kern County jails: the Central Receiving Facility in downtown Bakersfield (hereafter, CRF); which includes the Inmate Reception Center (hereafter IRC); the Men's and Women's Minimum Facilities at Lerdo (hereafter, the Farm); the Lerdo Pretrial Facility (hereafter, Lerdo Pretrial); and the Lerdo Maximum/Medium Facility (hereafter, Max-Med). The original complaint was filed on April 4, 1990, and answered by defendants, the County of Kern and the then-sheriff of Kern County, John Smith on July 9, 1990. Pursuant to court order, an amended complaint was filed on August 2, 1990, and was answered on August 9, 1990.

A preliminary injunction issued on October 2, 1990. The injunction was modified on March 22 1991 and on May 23, 1991 and remains in force as modified. On November 8, 1991, the court recommended additional modifications, and those Findings and Recommendations are pending.

A number of issues were resolved through summary judgment. Order, March 26, 1991. Two other issues were resolved through an offer and acceptance of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. Offer of Judgment, filed February 21, 1991; Acceptance, filed March 4, 1991. Other issues were abandoned by plaintiffs or were otherwise disposed of during the course of trial, which was held March 4,-8, 1991 at Lerdo, and April 8-23, 1991 in Sacramento. Post trial briefing was completed on July 24, 1991.

II. GENERAL LEGAL STANDARDS

The plaintiff class includes both pretrial detainees and convicted prisoners serving sentences at the Kern County jails. As a general rule, civil rights claims regarding conditions of confinement affecting pretrial detainees are analyzed under the Fourteenth Amendment, while those affecting postconviction prisoners are analyzed under the Eighth Amendment. *See Ingraham v. Wright*, 430 U.S. 651, 671-72 n. 40 (1977).

A finding of constitutional violations cannot be based upon the totality of the conditions of confinement. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). Although unconstitutionality may result form the synergistic effect of related conditions, the court muyst find specific conditions which, in themselves, are unconstitutional. *Id.* at 1247; *see, also, Wilson v. Seiter, supra.* While jail officials are not required to provide comfortable jails, nor to provide every amenity to inmates, they

are required by both the Eighth and the Fourteenth Amendments to provide, at a minimum, adequate food, clothing, shelter, sanitation, medical care and personal safety. *Bell v. Wolfish, supra*, at 537; *Hoptowit v. Ray, supra*, at 1246.

Only the specific unconstitutional conditions may be ordered remedied, and the remedy must be limited to that which corrects the specific violations, unless there is a past history of both constitutional violations and failures to follow court orders. *Hoptowit v. Ray, supra*, at 1246. The court "should defer to the policy choices made by prison officials and order a remedy consistent with the basic approach taken by prison officials" unless that approach is itself unconstitutional. *Id.*

A. Pretrial Detainees

The seminal case applying Fourteenth Amendment analysis to pretrial detainees is *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Bell* the Supreme Court held that it is a violation of due process for persons to be punished prior to an adjudication of guilt. *id.* at 535. Thus, the threshold inquiry for Fourteenth Amendment purposes is whether the condition of confinement complained of amounts to "punishment." In resolving this issue, the court must first inquire whether said condition is imposed for the express purpose of punishment. If no express intent to punish is found, the court must then inquire into whether the condition complained of is rationally connected with an alternative purpose and does not appear to be excessive in relation to the alternative purpose assigned to it. *id.* at 538 (citation omitted). "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental object, it does not, without more, amount to 'punishment'." *Id.* at 539. Conversely, if a condition of

confinement is not reasonably related to a legitimate goal, the court "may permissibly infer that the purpose of the government action is punishment. . . ." *Id.*; *see also Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989).

B. Postconviction Prisoners

Although postconviction prisoners may be punished, the Eighth Amendment proscribes cruel and unusual punishments. Cruel and unusual punishments are those resulting in the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). "An express intent to inflict unnecessary pain is not required, (citation omitted) and harsh 'conditions of confinement' may constitute cruel and unusual punishment unless such conditions 'are part of the penalty that criminal offenders pay for their offenses against society.' " *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

Recently, the Supreme Court has articulated the showing necessary to establish liability under the Eighth Amendment in a case challenging general conditions of confinement. *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). To prevail, plaintiffs must show, first, that the condition complained of amounts to the unnecessary and wanton infliction of pain. *Id.* (internal quotations and citations omitted). The Constitution "does not mandate comfortable prisons"; therefore, "only those deprivations denying 'the minimal civilized measures of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* (internal quotations and citations omitted). Once plaintiffs have met this objective requirement, they have the additional burden of proving that the prison officials had the requisite

culpable state of mind to establish liability. The state of mind applicable to Eighth Amendment claims is that of "wantonness."[1] In a prison conditions case brought under the Eighth Amendment, "wantonness" equals the "deliberate indifference" standard articulated in *Estelle v. Gamble*, 429 U.S. 97 (1976). *Id.*

Deliberate indifference in *Estelle*, is largely defined in the negative: i.e., it is not "mere indifference" or "negligence." In *Whitley v. Albers*, 475 U.S. 312 (1986), the Supreme Court defined deliberate indifference as "obduracy and wantonness, not inadvertence or error in good faith." *Id.* at 319. The *Wilson* court stated that, in a prison conditions case, the "wantonness" required to establish deliberate indifference was something less than a showing that defendants acted "maliciously and sadistically for the very purpose of causing harm" *Wilson, supra*, (internal quotations and citations omitted). In sum, the requisite state of mind needed to establish that defendants' conduct in a general jail or prison conditions cases violates the Eighth Amendment is somewhere between negligence resulting in the harm complained of and the malicious, purposeful infliction of said harm.

C. Mixed Jail Populations

In an institution where pretrial detainees and convicted prisoners are not wholly separated, the proper

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[1] In *Smith v. Wade*, 461 U.S. 30 (1983), the Supreme Court defined "wantonness" as "the licentious act of one man toward the person of another without regard to his rights; . . . the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure." *Id.* at 39-40 n. 8 (quoted in *Redman v. County of San Diego*, 942 F.2d 1435, 1443 n. 10 (9th Cir. 1991)).

constitutional standard for review of conditions affecting both classes of inmates is ordinarily the Fourteenth Amendment substantive due process standard. *Fischer v. Winter*, 564 F. Supp. 281, 297 (N.D. Cal. 1983). This situation obtains at the Kern County jails to some extent. Thus, insofar as each specific condition complained of affects all Kern County jail inmates, the Fourteenth Amendment standard is the appropriate standard for review unless the Eighth Amendment standard, as discussed below, provides a higher standard in a particular situation.

Although the Fourteenth Amendment standard, since it precludes punishment, is usually somewhat higher, it is tempered by consideration of the length of time inmates are exposed to the challenged conditions. *Hutto v. Finney*, 437 U.S. 678, 686 (1978). Therefore, a given condition might be unconstitutional under the Eighth Amendment in the prison context, where prisoners are presumed to be incarcerated for relatively lengthy periods, while it may be constitutional under the Fourteenth Amendment in the jail context, where inmates may be incarcerated for relatively short periods. "Length of confinement" refers both to the total term of incarceration and to the number of hours inmates are confined in their cells daily. *Id.*

Recently, in a case involving a pretrial detainee, the Court of Appeals for the Ninth Circuit has conflated the standards by which alleged Eighth and Fourteenth Amendment violations are reviewed. *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc). First, the *Redman* court reviewed the standard applied to general conditions of confinement in the prison context, i.e., whether the conduct of prison officials that is "either 'an unnecessary and wanton infliction of pain' or 'repugnant to the conscience of mankind' is 'sufficientiy harmful to evidence deliberate indifference.' " *Redman,*

supra, at 1441 (quoting *Estelle v. Gamble*, 429 U.S. at 105-06). "Deliberate indifference," in turn, is defined as involving some degree of individual culpability on the part of prison officials, but without necessitating a finding of an express intent to punish. *Id.* at 1142 (quoting *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). After reciting this standard, the *Redman* court stated:

> That "deliberate indifference" is the standard used to measure violations of the eighth amendment's proscription of cruel and unusual punishment does not mean it applies only to persons who may be punished. [Plaintiff's] status as a pretrial detainee who may not be punished, therefore, does not preclude application of the standard. We do not find it inappropriate that the same standard may be used under the fourteenth and eighth amendments.
>
> * * *
>
> The requirement of conduct that amounts to "deliberate indifference" provides an appropriate balance of the pretrial detainees' right not to be punished with the deference given to prison officials to manage the prisons. This standard also comports with the purpose of the due process clause: to protect against the deliberate, but arbitrary, choices by government, *Id.*, at 1142-43.

The *Redman* court expressly reserved the issue, however, of whether the state of mind inquiry mandated in the Eighth Amendment context by *Wilson v. Seiter*,

supra, would be required in determining whether the Fourteenth Amendment had been violated. *See also Jordan v. Gardner*, 953 F.2d 1137, 1149 n. 5 (9th Cir. 1992).

III. ANALYSIS

Plaintiffs seek a permanent injunction on the following issues: an upper limit on the inmate population of the five facilities; medical and correctional staffing increases; dental, vision and mental health care for inmates; Spanish language interpreters for Spanish-speaking inmates seeking medical care; access to the courts; classification of administratively segregated inmates, thus permitting some of them to exercise together; prompt probable cause hearings; and ancillary orders concerning the notification of the judgment and its enforcement.

A. Population Cap

When this litigation commenced, the total combined population of the Kern County jails at issue was 2,600, while the Board of Corrections' rated capacity for all five facilities combined was 1,528.[2] Under the terms of the preliminary injunction filed October 2, 1990, and pursuant to the parties' stipulation, the population for all the jails combined was limited to 2,200 inmates. The

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[2] The specific Board-rated capacities of each of the facilities is as follows:

CRF:	292
Farm:	76 Women
	704 Men
Max/Med:	364
Lerdo Pretrial:	672

court has recommend a modification of the preliminary injunction that will increase the population limit to 2,330 inmates. Plaintiffs now seek permanent injunctive relief limiting the inmate population to the Board-rated capacity for each cell in each facility, or a total of 1,528 inmates.[3]

Overcrowding alone is not a constitutional violation, but it can lead to unconstitutional conditions. *Hoptowit v. Ray, supra.* Overcrowding that leads to inmates sleeping on the floor violates the Fourteenth Amendment. *See Thompson v. City of Los Angeles, supra.* At the commencement of this litigation, as a result of overcrowding, inmates were sleeping on the floors of a number of the facilities. The preliminary injunction, in its original form and as modified, was designed to eliminate this practice. During the preliminary proceedings plaintiffs demonstrated that this overcrowding resulted in the denial of adequate exercise, and in arrestees being held for prolonged periods in holding cells without bedding. Plaintiffs also contended that overcrowding resulted in the denial of necessary services, including medical, mental health, and dental care, and in dangerously inadequate levels of staffing.

Defendants contend that, with the assistance of the court's order permitting them to release inmates when the jail population exceeds the ordered limits, and as the result of changes including the closing of certain

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[3] The Board of Corrections has recently approved a pilot program at the Kern County jails which would increase the rated capacity of the Lerdo Pretrial Facility to 1,232 inmates from its present rated capacity of 672 inmates through installation of a second bunk in the cells of 35 of the 42 housing units. Each housing unit contains 16 cells, all of which presently contain one bunk. The Board of Corrections had, until it approved the pilot program, based its rated capacity on the premise that each of these cells would house a single inmate.

facilities and the modification of others, they have addressed the unconstitutional conditions resulting from past overcrowding. They request a final Order that would limit inmate population on a facility-by-facility basis, rather than the cell-by-cell basis plaintiffs request; that would require the sheriff to release inmates when the population limit in a given facility is exceeded; and that would prohibit floor sleeping.

Based on the testimony at trial, including a careful view of all facilities, the court finds that a permanent injunction incorporating a population cap is necessary[4] to prevent a recurrence of unconstitutional conditions such as floor sleeping.[5] To grant plaintiffs' request for a cell-by-cell population cap, however, would unnecessarily limit defendants' discretion in making classification decisions, and would not correct unconstitutional conditions more effectively than the solution defendants request. Therefore, this court will recommend a facility-by-facility cap, similar to that contained in the preliminary injunction. The permanent injunction should also incorporate a releasing order similar to that already in effect.

B. Staff Increases

Plaintiffs contend that the correctional staffing levels at the Kern County facilities are inadequate to insure the safety of inmates. Specifically, they content that there

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[4] The sheriff requested a court order limiting the inmate population and enabling him to release inmates. See Reporter's Transcript ("RT") 3/5/91 - 3/8/91: 310 at 15-22.

[5] Defendants agreed to abolish floor sleeping, through a Rule 68 motion before trial. However, they contend that they need a court order to effectuate this agreement. Defendants' Post-trial Brief, 63 at 19-22.

are not enough correctional staff in the medium custody dormitory portions if the Lerdo Maximun/Medium facility.

Staffing which falls below the minimum level needed to insure inmate safety may violate the Constitution, *see Youngberg v. Romeo*, 457 U.S. 307, 315 (1982), as may overcrowding combined with inadequate staffing, *see Balla v. Idaho Bd. of Corrections*, 869 F.2d 461, 471 (9th Cir. 1989). The uncontradicted testimony concerning the staffing levels at the medium custody dormitory portion of the Maximun/Medium Facility established that the then-current level of two custodial officers per each four person post was inadequate to insure safety in the dormitories. Reporter's Transcript (hereinafter "RT") 3/5/91 - 3/8/91: 113 (testimony of defendant former Sheriff Smith); 285 (testimony of defendant Sheriff Sparks); 1990-200 (testimony of deputy sheriff Urner); RT 4/15/91: 97 (testimony of Ray Nelson); RT 4/17/91: 57-59 (testimony of Ray Coleman).

Although defendants agree that the staffing level in the medium custody dormitory command posts was inadequate to satisfy "good safety and security procedures" (Post-trial Brief at 52), they contend that there was no evidence that this short staffing actually resulted in any constitutional violation. This statement is inaccurate. In fact, Deputy Urner[6] and inmate Mitchell[7] both testified concerning fights in the dormitories that the staff present in the command post positions could not stop. Moreover, the evidence was clear that having only two persons staffing a four-person post left half of the dormitories without any oversight at any given time. Defendants further argue that they have adequately responded to the problem by closing down the

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[6] RT 3/5/91 - 3/8/91: 199-200.

[7] Rt 3/5/91 - 3/8/91: 141.

Maximum/Medium Facility, thereby rendering any orders on this issue moot. Defendants' Post-trial Brief 54 at 10-17, and Exhibit "F" (Declaration of Undersheriff Jerry Findley).

The court finds, based on the evidence presented at trial, including its own view of the facility, that the staffing level at the Maximum/Medium Facility dormitory command posts was inadequate to insure the safety of inmates in those dormitories. Four staff are required to adequately man each of these positions, not two. Moreover, defendants' argument that the issue is moot because the facility has been closed down is not persuasive. Although Undersheriff Findley's declaration asserts that the facility has been closed for this fiscal year due to budgetary restrictions, it is unclear how long this facility will, in fact, remain closed. Defendants' proposed Pilot Project, Exhibit "I" to the Post-trial Brief, and approved by the Board of Corrections on July 18, 1991, states in pertinent part that:

> This facility will be closed for the 1991/92 fiscal year. As with most California counties this year, Kern County is in a budget crisis and funding is simply not available to properly staff the Max-Med Facility this year. In order to put this facility to use, Kern County is presently negotiating with several interested agencies, including the State of California, to lease this facility on a short-term basis for prison needs.
>
> Kern County continues to be one of the fastest growing counties in the state, and thus is in the enviable position of having a facility available to meet its long-term correctional needs

> without overcrowding. Exhibit "I" at 4.

This statement clearly indicates that the Maximum/ Medium Facility may be reopened as a county jail facility if and when additional funds are made available for its operation. It also amounts to an admission that the staffing levels current at the time the facility was shut down were, in fact, inadequate.

For the foregoing reasons, this court will recommend that defendants be permanently enjoined from operating the Maximum/Medium Facility without a full complement of four correctional staff present at each observation post in the medium dormitory sections of the facility.

Plaintiffs also contend that there are inadequate medical and mental health staff to provide proper care to inmates. This issue is subsumed within the broader allegations of inadequate medical and mental health treatment, and will be discussd in the Findings and Recommendations on those issues, *infra*.

C. Dental Care

Plaintiffs allege that the dental care provided to inmates at the Kern County jails is constitutionally inadequate. They seek an order requiring defendants to provide dental care which would include more than extractions and temporary fillings. They ask the court to order counsel for both parties, Dr. Hair, the current dentist at the Kern County jails, and Dr. Rosenblum, plaintiffs' expert witness on dental care, to meet and confer and to present a joint plan to the court concerning additional dental care. if the parties cannot agree on a joint plan, plaintiffs request that the parties be permitted to submit their individual plans, and the reasons therefor.

The plan or plans would be submitted within 30 days of the date of final judgment.

Dental care is an aspect of medical care. "[D]ental care is one of the most important medical needs of inmates." *Ramos v. Lamm*, 639 F.2d 559, 576 (10th Cir. 1980), *cert. denied*, 481 U.S. 1041 (1981). "Ready access" by inmates to adequate dental health care is constitutionally required. *Hunt v. Dental Dept.*, 865 F.2d 198, 200 (9th Cir. 1989) (quoting *Hoptowit v. Ray, supra*, 682 F.2d at 1253). A delay in providing dental care, where the inmate seeking such care has made prison officials aware that a dental problem is causing the inmate severe pain and possible permanent damage to the inmate's teeth and ability to eat properly, may amount to a constitutional violation. *Id.*

Defendants do not dispute that inmates are entitled to ready access to dental health care. The issue is whether the dental care being provided is constitutionally "adequate."

All of the inmates who testified regarding dental care indicated that the only dental treatment provided to them was extraction, and that, in some cases, they avoided seeking dental care despite their need for such care because they wished to avoid extraction. *See* RT 4/8/91: 18 (testimony of Laurie Schuck); 79 (testimony of Victor Clark); RT 3/5/91 - 3/8/91: 471 (testimony of Irene Juarez); 450 (testimony of Jesse Vasquez).

Dr. Rosenblum, plaintiffs' expert witness on this issue, testified that he had reviewed a random sample of 150 dental charts. He testified that, of this number, a total of 140 showed that the teeth had been extracted, and that only one showed that a temporary filling had been done. RT 4/12/91: 10. He testified that the charts showed that no other dental procedures had been performed.

Dr. Hair, the dental care provider at the Kern County jails, admitted that the written policy prevented him from providing any services other than emergency services, including extractions, relief of pain, treatment of infection, and oral surgery procedures required for the treatment of facial trauma. He further testified that the written policy specifically prohibited the provision of services such as fillings and repairs, dental hygiene services, bridge work, dentures and related procedures. He testified that, despite the written policy, he had occasionally performed the precluded services, including temporary fillings, recementing crowns and bridges, and the repair of dentures or partial plates where these interfere with the ability to eat, but that there was a whole range of services he could not provide, regardless of need. RT 4/12/91: 49.

Defendants, in their post-trail brief, argue that no court order is necessary to address any deficiencies in the adequacy of the dental care provided to inmates at the Kern County jails because they have adopted and are implementing a revised policy which permits the following procedures and services to be performed:

> -treatment of infection
>
> -relief of pain
>
> -extractions
>
> -pulpotomies
>
> -repair of dentures
>
> -temporary fillings
>
> -stainless steel crowns
>
> Kern Medical Center, Correctional Medicine Department, Policy and Procedure Manual, Dental Services, No. 600.00 (Defendants' Exhibit B to the Post-trial Brief).

Moreover, defendants include in their revised policy a

provision for the individual evaluation of dental procedures or prostheses beyond those enumerated above by the Kern County Health Authority in consultation with the primary dental care provider and a physician. The policy provides for the review of any denials of such "nonroutine" dental care by an independent Quality Assurance Committee.

This court's primary concern, expressed on the record,[8] concerning the adequacy of the dental care provided to Kern County jail inmates under the then-current policy was that it precluded the exercise of professional discretion by the primary dental care provider to determine what dental procedures were required to insure appropriate treatment of dental complaints. The revised policy addresses this concern by entrusting decisions concerning the provision of the enumerated "routine" procedures to the professional discretion of the Correctional Medical dentist.[9] Moreover, the revised policy provides for an extended range of "routine" dental procedures beyond extraction and the alleviation through drug treatment of acute pain and infection. Finally, the revised policy contains a procedure for the provision of dental care beyond the extended range of routine procedures and a provision for the evaluation of decisions to deny such care. Defendants' revised policy provides for constitutionally adequate dental care.

A defendant's changes in policy voluntarily undertaken in response to litigation do not render an issue moot unless "there is no reasonable likelihood that the

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[8] RT 4/12/91: 130; RT 4/23/91: 175.

[9] Currently, the Correctional Medical dentist is Dr. hair, and his contract has been extended through the 1991-1992 fiscal year. Defendants' Post-trial Brief, Exhibit B, Declaration of Barbara Pawley.

wrong will be repeated." *United States v. W.T. Grant. Co.*, 345 US. 629, 632, 633 (1953); H. Hart and H. Wechsler, *The Federal Courts and the Federal System*, 206 (3d ed. 1988) Thus, voluntary cessation of allegedly illegal conduct will only render an issue moot if: 1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; and 2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *County of L.A. v. Davis*, 440 U.S. 625, 632 (1979) (citations and internal quotations omitted).

When a policy change is announced to the public and the courts, as well as the parties to a litigation, this may be sufficient to show that there is "no reasonable likelihood" that the allegedly illegal conduct will recur. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72 (1983) (per curiam). On the other hand, when a government entity is free to reenact a challenged provision once the litigation subsides, the voluntary change prompted by the litigation may not suffice to render the issue moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Coral Const. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991).

The issue, then, is whether there is a reasonable basis for concluding that defendants have undertaken to change their dental care policy in good faith and whether there is any indication that they will abandon their efforts to provide improved dental care once this litigation ends. *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851-854 (9th Cir. 1985). The court finds that, because defendants have announced their new policy to the court, to the parties, and to the public, because the revised written policy is available to the plaintiff class, and because the defendants incorporated the recommendations of plaintiffs' expert witness and the concerns expressed by their own primary dental care provider into

the revised policy, the policy changes were undertaken in good faith rather than simply to avoid an injunction on this issue. There appears no reasonable likelihood that they will resume their former practices once this litigation is concluded.

As indicated above, the court finds that the revised policy eliminates the alleged constitutional violations arising under the former policy. Because the court has found that there is no reasonable likelihood that the policy will not be implemented as written, regardless of whether this court enjoins defendants from reenacting their former policy, this eradication is "irrevocable." Cf. *City of Mesquite, supra*, 289 n. 11 (defendants announced their intention to reenact challenged statute if district court's judgment vacated). Nothing would be added to the resolution of this issue by granting the relief plaintiffs seek, i.e., ordering counsel for the parties and Drs. Rosenblum and Hair to meet and confer and submit a proposed dental care policy. It will therefore be recommended that further relief in this area be denied in light of the changes in defendants' policies and practices.

D. Vision Care

At the time of trial, defendants' policy concerning the provision of eyeglasses to inmates was the following:

> Inmates experiencing significant vision problems can be referred by a Responsible Physician or the Health Authority to Kern Medical Center Ophthalmology Clinic for examination and testing. It is the inmate's responsibility to purchase glasses from his or her own funds once a prescription is written. Any exception to this policy

> must be approved by the Health Authority.
>
> Kern Medical Center Correctional Medicine Department Policy and Procedure Manual at 135, Defendants' Exhibit FFFF.

Barbara Pawley, the liaison between the Kern County jails and the Kern Medical Center, testified at trial that she was aware of only two instances in which exceptions to the policy requiring inmates to pay for their own glasses had been approved by the Health Authority. RT 4/17/91: 144 at 9-25. Both cases involved inmate workers who had come into jail with their own glasses, and had broken them while incarcerated. In one case, the glasses had been broken on the job. Both inmates were myopic, and could not properly perform their jobs without glasses. Plaintiffs assert that this level of provision of vision care is constitutionally inadequate. They argue that, where a serious medical need for eyeglasses is established but an indigent inmate cannot pay for his or her own eyeglasses, the policy manifests deliberate indifference to a serious medical need.

Defendants assert, first, that plaintiffs have not supported their burden of proving the constitutional inadequacy of the vision care provided under the policy current at the time of trial, because they did not produce testimony from any inmate that he or she had a medically determined need for eyeglasses that was not met. Defendants further contend, however, that assuming that plaintiffs' evidence concerning the policy and its implementation, as established through the testimony of Barbara Pawley, is sufficient to support their burden, a court order is not necessary because the policy has since been changed. The revised policy states:

> Inmates with vision problems will be referred by Correctional Medicine staff to Kern Medical Center Ophthalmology Clinic for examination and testing. The Ophthalmologist will prescribe medically required eyeglasses, which will be purchased by the County according to Medi-Cal guidelines:
>
> Eyeglasses that are brought into jail and are broken will be repaired or replaced as necessary.
>
> Kern Medical Center, Correctional Medicine Department Policy and Procedure Manual Vision Services, Number 601.00 (Exhibit C to Defendants' Post-trial Brief)

The revised procedure provides that inmates who will be released from jail within three weeks will receive their prescription and instructions to follow up upon release. *Id.*

The cases dealing with the specific denial of eyeglasses as an aspect of constitutionally deficient medical care are very limited, and there are no cases speaking directly to the point in this Circuit. *See Newman v. State of Alabama*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (unavailability of eyeglasses and prostheses violates Eighth Amendment); *but see Nicholson v. Choctaw County, Ala.*, 498 F. Supp. 295, 308-309 (S.D. Ala. 1980) (where county jail inmates not held for more than 30 days, no constitutional requirement to provide eyeglasses). The issue may, however, be appropriately analyzed by the "deliberate indifference" standard, discussed *supra*. *Estelle v. Gamble, supra*, defines as unconstitutional "deliberate

indifference to serious medical needs." 429 U.S. at 106. Courts have further refined this concept to define a "serious medical need" as one "that has been diagnosed by a physician as mandating treatment. . . ." *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203, 208 (1st Cir. 1990); *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 327 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988). Under the policy at issue here, an inmate has to have, by definition, a physician's diagnosis that he or she requires corrective lenses in order for the issue of providing eyeglasses to arise. Thus, under the constitutional standard prohibiting deliberate indifference to a serious medical need, the former policy was unconstitutional. Plaintiffs, by eliciting testimony concerning the policy and its application from one of the persons charged with its development and application, Barbara Pawley, have sustained their burden of proof on this issue.

The question remains whether there is any need for permanent injunctive relief in light of defendants' revised policy, which does contain a provision, applying objective standards, for supplying corrective lenses to indigent prisoners who have been medically determined to require them. As with the revised dental care policy, this court finds no reasonable basis for believing that defendants will not, in good faith, apply the revised vision care policy. Accordingly, it will not recommend injunctive relief on this issue.

E. Mental Health Care

Plaintiffs seek injunctive relief concerning mental health care in a number of areas, including ordering defendants to increase the numbers and qualifications of medical as well as mental health staff, an end to the use of safety cells for observation and/or restraint of

mentally-ill inmates, the transfer of "acutely psychiatric (sic) prisoners" to the Kern Medical Center psychiatric ward for inpatient treatment, and the provision of bilingual Spanish-English speakers, preferaby medical staff, to translate during medical interviews for Spanish-speaking inmates. Since plaintiffs also seek an injunction incorporating the six essential elements of constitutionally adequate mental health care adopted by the District Court in *Balla v. Idaho State Bd. of Corrections*, 595 F.Supp. 1558, 1577 (D. Idaho 1984), *aff'd*, 869 F.2d 461, 463 (9th Cir. 1989), and since the various specific requests for relief fit broadly within the framework of the *Balla* holding, this court will use that holding as a framework for analysis.

1. Initial Screening of Inmates for Mental Health Needs

The first essential element for constitutionally adequate mental health care is a systematic screening and evaluation program for identifying inmates needing mental health treatment. Defendants have such a program,[10] but plaintiffs argue that it is inadequate

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[10] The Central Receiving Facility Policy and Procedure, governing the initial intake of inmates into the Kern County jails, provide procedures for the reception of suicidal, mentally disordered, and developmentally disabled inmates, and for the referral of such inmates to mental health staff. *Id.* at C-200. The policy governing the initial handling of inmates appearing to be suicidal, reporting suicidal thoughts, or attempting suicide, is to segregate such inmates temporarily for observation and evaluation. The policy governing the initial handling of inmates in need of psychiatric attention or suspected of suffering from any type of mental disorder is to segregate such inmates temporarily pending an evaluation by the medical and mental health staffs. Inmates who appear to be developmentally disabled are to be segregated upon determination that such segregation is required for the inmate's own safety. Mental health

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because it relies on correctional staff to do the initial screening and evaluation. Plaintiffs contend that a

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or medical staff are then required to contact the Kern Medical Center within 24 hours (excluding holidays and weekends) for further diagnosis and/or treatment. All inmates requiring segregation for the above reasons are to be monitored pending evaluation by mental health staff. The care of inmates with mental health problems is the responsibility of the medical and mental health staffs, not the correctional staff.

The procedures provide guidelines to correctional staff in identifying inmates with mental health problems. The receiving officer is to review the field arrest data and any other information received from the arresting officer or the transporting officer to determine whether an inmate has suicidal, mentally disordered or developmentally disabled "tendencies." The data entry operator who records the booking information is to notify the receiving officer if the inmate expresses suicidal thoughts or is observed attempting suicide or if the inmate displays unusual or bizarre behavior. The data entry operator is then to transmit via computer printout to the medical staff at the Lerdo Pretrial Facility for further handling all completed bookings recording inmate statements regarding mental health problems. Non-sworn staff are to notify a deputy if they observe an inmate displaying suicidal, mentally disordered or developmentally disabled behavior.

Once an inmate is identified as having a mental health problem, the procedures provide for any officer to review the inmate's booking information, to request medical staff to check the inmate for injuries, and to request mental health staff to evaluate the inmate. The officer is to remain with the medical or mental health staffer during examination, and to follow all recommendations resulting therefrom. The officer is also required to file a written report on the situation and on medical or mental health staff recommendations and to submit it to his or her supervising officer, and to ensure that the inmate is housed in accordance with the recommendation.

There is also a procedure to be followed if medical or mental health staff is unavailable. The inmate is to be segregated and a "suicide watch" begun, involving direct observation of the inmate every 15 minutes, pending evaluation by medical or mental health staff. In extreme emergencies, a deputy may, with his supervisor's

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mental health care professional must do the initial screening in order for the program to meet constitutional standards. There is simply no authority supporting plaintiffs' contention.

Plaintiffs cite *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1462 (9th Cir. 1988), *vacated*, __ U.S. __, 109 S.C. 2425 (1989) *reinstated on remand*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1838 (1990). Nothing in the *Cabrales* holding, however, indicates that an initial screening for mental health problems cannot be performed by correctional staff, provided that inmates determined to have such needs have prompt and adequate access to competent mental health staff able to provide competent care.[11]

Plaintiffs also cite *Balla v. Idaho, supra*, as support for their contention, but a careful reading of the case fails to reveal any finding that the Constitution requires that mental health screening be performed by mental health professionals rather than correctional staff. In *Balla*, the court was presented with a situation involving prison (not jail) inmates who received "little or no screening or testing" upon reception, and where diagnosis of mental health problems was "haphazard." *Balla*, 595 F.2d at 1568. Thus, the court found it appropriate to adopt the "six essential components of a minimally adequate mental health treatment program" set forth in *Ruiz v. Eestelle*, 503 F.Supp 1265 (S.D. Texas

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(fn. continued)
approval, send an inmate directly to the Kern Medical Center.

Mental health staff are required to interview and evaluate any inmate requesting mental health treatment and any inmate referred to such staff by deputies. In turn, such staff are to submit written recommendations for care of the inmate to the supervising officer.

[11] In fact, in *Cabrales* the deceased inmate whose death gave rise to the action had been "evaluated on several occasions by various medical personnel." *Cabrales*, 864 F.2d at 1461.

1980), including the requirement of a systematic program of evaluation in order to identify inmates needing psychiatric treatment. Nowhere in either the *Balla* or *Ruiz* holdings do the district courts state or even imply that correctional staff, properly trained and supervised, are constitutionally precluded from performing an initial identification of inmates suspected of having or actually manifesting mental health problems.

2. Segregation and Close Supervision

The second component of constitutionally adequate mental health car identified in *Balla* is that such care must entail more than segregation and close supervision. Plaintiffs have failed to support their burden of showing that the only mental health care provided to inmates is "segregation and close supervision." While this may be the initial "treatment" provided for under the Central Receiving Facility guidelines where medical or mental health care staff are not immediately available, see above, there is no indication in the record that this is the full extent of available mental health treatment. At the time of trial, there were five psychiatric technicians available at the Lerdo jails seven days a week, and a part-time psychiatrist on site at the Lerdo jails. Moreover, the evidence established that the psychiatric staff at the Kern Medical Center was available for consultation and back-up support. Since trial ended, defendants have established a psychiatric unit for male inmates[12] at the Lerdo Pretrial Facility. One psychiatric technician and a deputy are to be present in the unit 12 hours a day, seven days a week. The psychiatric technician is to supervise day room activities including

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[12] Female inmates with acute mental health needs were, and continue to be, housed in the Lerdo Pretrial Facility infirmary.

education, group and recreational activities, and a psychiatrist will make daily rounds five days a week.

While treatment relies heavily on medication[13] rather than individual or group therapy, plaintiffs failed to show that this level of treatment was not on a par with that afforded to members of the community at the Kern Medical Center. Indeed, plaintiffs' expert Dr. Rundle testified that, in his opinion, those inmates who were "seriously mentally ill with florid delusions and hallucinations and seriously disordered thought" should have been in an "acute psychiatric treatment ward, such as I understand is available at the Kern Medical Center." RT 5/11/91: 29. Dr. Rundle testified that if inmates were transferred to the Kern Medical Center psychiatric ward, they would "been seen daily by a psychiatrist. They would have trained nursing staff about them all the time. They'd be involved in activities. . . ." *Id.* at 6-9. There does not appear to be any substantive difference between this level of care and that which is to be provided to inmates in the psychiatric ward at Lerdo Pretrial Facility. Beyond this, Dr. Rundle "presumed" or thought it "possible" that severely mentally ill patients at the Kern Medical Center would be able to participate in group therapy or to speak to a "primary therapist."[14] *Id.*

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[13] See, e.g., testimony of Bobby Gilbert, RT 3/5/91-3/8/01: 118-119 and Gerald Mitchell, *Id.*: 134 at 12-14, 135 at 2-12, 137 at 24-25, 138 at 1-2, 144 at 13-25.

[14] Dr. Rundle did not explain precisely what he meant by the term "primary therapist" or distinguish between this category of caregiver and a psychiatrist. Plaintiffs imply in their post-trial reply brief that "primary therapists" are mental health counselors and/or psychologists. Post Trial Reply Brief: 12 at 26-27. Plaintiffs did not establish at trial that such caregivers are available to patients at the Kern Medical Center. Moreover, trial testimony from inmates and staff established that psychiatric technicians counsel inmates on a regular basis and perform crisis intervention functions at the jails.

at 8-11. These presumptions or possibilities are insufficient to establish that the level of treatment provided to inmates in the Lerdo Pretrial psychiatric ward falls below the level of care available to persons in the community at large receiving mental health treatment at the Kern Medical Center.

Plaintiffs also imply that the new psychiatric ward at Lerdo Pretrial Facility is inadequate to provide treatment for all of those inmates requiring such treatment. There is room for 16 make inmates in the new ward. Plaintiffs state conclusorily that there are 110 "severely mentally ill" inmates in the Kern County jails, but appear to base this conclusion on Dr. Rundle's estimate of the numbers of Texas prison inmates so classifiable in 1980 rather than any meaningful statistical sampling of Kern County jail inmates in 1990-91. *See Ruiz v. Estelle, surpa*, 503 F.Supp. at 1332 n. 141; Plaintiffs' Post-Trial Brief: 30 at 14-16; Plaintiffs' Post-Trial Reply Brief: 12 at 2-7.[15]

3. Individualized Treatment

The third essential component of constitutionally adequate mental health care identified in *Balla* is that caregivers include sufficient numbers of trained mental health professionals so that inmates requiring treatment for serious mental disorders may be identified and treated in an individualized manner. It is this component upon which plaintiffs lay the greatest stress and seek the most specific remedy in requesting a court order compelling defendants to hire more mental health staff, including a "full-time psychologist 'Mental Health Department Head' " and a half-time psychiatrist. Plain-

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[15] Dr. Rundle testified that he "actually observed" about 10 mentally-ill inmates during his three days at the Kern County jails. RT 5/11/91: 94 at 17-19; 112 at 16-22.

tiffs' Post-Trial Brief: 61 at 21-26.[16] As noted above, defendants have now hired a half-time psychiatrist. Moreover, the trial testimony indicated that defendants had funded such a position for two fiscal years and had actively sought to fill it, but had had difficulties attracting a qualified psychiatrist to work at the Kern County jails. Testimony of Barbara Pawley, RT 4/17/91: 91-95.[17] The sole remaining issue, therefore, is whether plaintiffs have shown that the existing staffing levels are constitutionally inadequate.

Plaintiffs presented the testimony of a number of inmates identified as having serious mental health needs. Bobby Gilbert testified that he had been housed in a segregation cell at the Maximum/Medium Facility section known as S-1 for approximately one and one half months, and that, prior to that, he was housed in the Lerdo Pretrial Facility segregation unit known as C-Pod. He testified that at C-Pod he had been housed alone, but

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[16] Plaintiffs also ask that the court order defendants to hire more medical personnel, including four physicians so that a doctor may conduct sick call seven days a week. There was no evidence presented at trial that there is such a shortage of medical staff as to deprive inmates of constitutionally adequate access to medical care. At the present time, daily sick call is conducted at all facilities by either a registered nurse or a physician's assistant. A physician conducts sick call five days a week. Despite lengthy testimony by inmates and by Dr. Weinstein concerning specific instances of alleged denial of adequate medical care, the court finds that plaintiffs did not support their burden of proof on this issue. Although plaintiffs abandoned the issue of the adequacy of medical care, except for dental, mental health and vision care, in their final briefing, they have included this request for more medical doctors and daily doctor sick call in their request for relief. It is unwarranted.

[17] If the *Wilson* requirement of culpable intent does indeed apply in the Fourteenth Amendment context, see *supra*, then this testimony would sufficiently refute allegations of such intent on this particular issue.

had been permitted to leave his cell for an hour daily, but that, in his current housing, he was "locked-down" 24 hours a day. He testified that in S-1 there was no television or radio and only limited access to books. He testified that he felt very depressed because of his isolation. Mr. Gilbert testified that he was taking the psychotropic medications Cogentin and Stelazine. He further testified that at one point he had been placed naked in the safety cell and had felt "degraded." He testified that he had been in the safety cell for approximately one and one-half hours. *Id.*: 132 at 8-10.[18]

Mr. Gilbert's medical records, affirmed by him on cross-examination, demonstrate that, upon his reception into the Kern County jail on December 22, 1990, he received a one hour psychiatric evaluation from one of the psychiatric technicians. The evaluation indicated that Mr. Gilbert was a paranoid schizophrenic who had been receiving psychotropic medications for his illness but had stopped taking them for approximately two weeks prior to incarceration. Mr. Gilbert appeared to be paranoid, but he denied suicidal ideations. Based on this evaluation, the psychiatric technician developed the following treatment plan: Mr. Gilbert was placed in a single cell "due to instability and anxiety"; was given a medical order for psychotropic medication; and was set for follow-up on the first available date. Dr. Unger, a medical doctor providing services to Kern County jail

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[18] The records indicate that Mr. Gilbert was placed in a safety cell on February 12 after the inmates in a neighboring cell told correctional staff that Mr. Gilbert had attempted to hang himself from the bars of his cell. An officer spoke to Mr. Gilbert who said that he was still thinking of hurting himself. Mr. Gilbert was moved to an observation cell on suicide watch that same day. On February 12, after it was determined that Mr. Gilbert was not suicidal, the suicide watch was terminated and Mr. Gilbert was moved from the observation cell to a regular single cell on February 13, 1991.

inmates, approved the medication by telephone order and reviewed and signed the file. The following day, the same psychiatric technician did a follow-up check on the psychotropic medication, and noted that Mr. Gilbert was "less paranoid" than the day before. She recommended regular rechecking of the medication, and Dr. Unger reviewed and approved the recommendation.

The records and the testimony show that other psychiatric technicians did follow-up evaluations of the medication levels and effects every one to two weeks thereafter, that their entries were reviewed by medical doctors, and that Mr. Gilbert was seen by a psychiatric technician daily from January 15-17 and on January 21, 22, 24, 28, 30; on February 5, 7, 12 (twice), 13 (twice), 14, 20, 21, 26 and 27, 1991.[19] Mr. Gilbert was also seen by a psychiatrist on January 22 and on February 5, 12, 14 and 27, 1991, and by physician's assistants, nurses, and a dentist during the months of January and February, 1991. Mr. Gilbert's testimony and the medical records indicate that Mr. Gilbert received mental health treatment on an individualized basis, including housing changes such as placement into and removal from a dormitory setting at Mr. Gilbert's own request, medication and changes in medication, and regular consultation with mental health staff during this period. The record indicated that Mr. Gilbert's mental illness was stabilized by medication and that he was in segregation at his own request because of his difficulties in coping with other inmates in a dormitory setting.

One of the psychiatric technicians who treated Mr. Gilbert also testified. Jana Swearingen's testimony indicated that she had known Mr. Gilbert professionally for at least six years and that he had been diagnosed as schizophrenic. Her testimony indicated familiarity with

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[19] Mr. Gilbert testified on March 5, 1991.

Mr. Gilbert's background and treatment history both within and outside the jail and her testimony further buttresses this court's finding that Mr. Gilbert's mental health treatment within the jail was based on his individual need. RT, 4/18/91: 118-120.

Gerald Louie Mitchell also testified. Mr. Mitchell was, at the time of his testimony, housed in a protective custody dormitory in the Maximum/Medium Facility. His medical records indicate that a psychiatric technician evaluated his mental health status after Mr. Mitchell injured himself by banging his head against his cell wall. The psychiatric technician noted that Mr. Mitchell had a lengthy history of mental health treatment in the community. She called the Kern County mental health center and obtained information on Mr. Mitchell's diagnosis and treatment. She determined that Mr. Mitchell had been diagnosed as having a schizoaffective disorder, sleep terrors, and severe depression, and that he was receiving psychotropic medications. Accordingly, the psychiatric technician obtained a verbal order from a medical doctor, Dr. Unger, to begin psychotropic medications for Mr. Mtichell.

Mr. Mitchell's medical records show that he was seen by psychiatric technicians on January 15, 16, 19, 20, 21, 23, 24, 28, 31, February 5, 13, 18, 19, and 20, 1991. He was also seen by psychiatrists on January 22, February 12, 14, and 22, 1991, and by physicians for evaluation of his psychotropic medications and housing on January 16, 17 and 18, 1991 while he was under suicide watch, and on February 4, 1991 for evaluation of his psychotropic medication. The records indicate that Mr. Mitchell received individualized mental health treatment including medications and changes in medications in response to Mr. Mitchell's complaints, housing changes responsive to his mental health concerns and consultations with mental health staff, including evaluation of his

complaints concerning medication, housing, and symptoms such as hearing voices. Mr. Mitchell's own testimony was somewhat disjointed, but did not contradict the record in any significant regard. The record indicates that the treatment Mr. Mitchell received stabilized his mental illness, to the point where he had ceased to be actively suicidal and was housed in a dormitory setting.

Two psychiatric technicians also testified concerning the scope of their responsibilities vis-a-vis the treatment of Kern County jail inmates with mental health problems. Dorothy Russell was called by plaintiffs; Jana Swearingen was called by defendants.

Ms. Russell, a licensed psychiatric technician, practiced at the Kern County jails full-time for eight months in 1984-85, part-time, from October, 1987 to May, 1988, and full-time from May, 1988 to July, 1990.

Ms. Russell testified that inmates were either self-referred to the psychiatric technicians or were referred by correctional and medical staff or by other inmates. She testified that the practice was for a psychiatric technician who received a referral to do an initial intake interview with the inmate-patient, and then to follow through with that inmate during the course of his or her incarceration. RT 3/4/91: 13 at 16-23. She estimated that the maximum number of inmate-patients she saw in a single day was 12-15. *Id.*: 15.

Mr. Russell testified that her duties as a psychiatric technician at the Kern County jails included forming an initial diagnostic impression based on a standard mental health evaluation scale, recording this impression on the intake interview form, and recommending psychotropic medications, including Haldol, Paladol, Mellaril, Lithium and antidepressants, in writing on the inmate's medical record. RT 3/4/91: 24 at 1-3; 25 at 12-13; 27 at 7-8. She testified that the diagnostic impression was

based on the results of an intake interview lasting approximately one hour, during which she observed the inmate's appearance, behavior and mental state and elicited information concerning the inmate's mental health history. *Id.*: 62. If the inmate reported any history of mental health treatment, she would contact the mental health provider, if possible. She would also consult any prior mental health records of that inmate retained by the jail. *Id.*: 63-64.

Ms. Russell testified that no psychiatrist actually visited the Kern County jails for some period of time in 1990, but that her recommendations for medication were countersigned by a physician who did visit the jails. *Id.*: 23 at 20-25; 25 at 15-19. Ms. Russell testified that to her knowledge no psychotropic medications were given to inmates unless the recommendation had been reviewed and co-signed by a physician. *Id.*: 69-70. She further testified that her duties included doing a follow-up examination of any inmate for whom psychotropic medications were prescribed after the inmate had received the initial dose of medication to insure that the medication was effective and that the inmate was not experiencing adverse side affects. *Id.*: 28 at 5-9.

Mr. Russell testified that she had complained about her working conditions to her supervisor, Bryan Bingham. Among her complaints were her perceived need for better medical and psychiatric backup for her initial diagnostic impressions and recommendations. *Id.*: 29-30. She testified that she felt that the responsibility she bore for treating inmates with mental health problems exceeded her level of training and that she believed she should have had the benefit of direct supervision by a psychiatrist. *Id.*: 31 at 17-21. Ms. Russell expressed her discomfort with recommending psychotropic medications for persons whose mental problems might have a physiological origin prior to those persons being

examined by a physician. *Id.*: 32 at 21-25; 33 at 1-4. She also testified, however, that if she saw an inmate-patient that she believed needed medical care, she would refer them to medical staff. *Id.*: 61 at 18-22.

Ms. Russell opined that a psychiatrist should have made the initial diagnostic impression, rather than a psychiatric technician, "because those diagnostic impressions were treated as diagnoses by other county facilities." *Id.*: 33 at 24-25; 34 at 1-3. This statement was not enlarged upon in further testimony.

Jana Swearingen testified regarding her role in delivering mental health care to Kern County jail inmates. Ms. Swearingen testified that she had been employed as a psychiatric technician at the Kern County jails for approximately seven years and was presently assigned to the Lerdo Pretrial Facility. She testified that her duties included initial psychiatric assessments, follow-up medication rechecks, crisis intervention, and arranging post-incarceration referrals to Kern County mental health providers. RT 5/18/91: 93. Ms. Swearingen's testimony concerning the initial assessment was essentially the same as that offered by Ms. Russell. She emphasized the distinction, however, between a diagnostic impression made by a psychiatric technician and a diagnosis made by a physician or psychiatrist. She also confirmed Ms. Russell's statements concerning the means by which inmates were referred to psychiatric technicians, i.e., through the courts, attorneys, family members, correctional staff, medical staff, other inmates and through self-referral by an inmate seeking mental health care. Mr. Swearingen also testified concerning the range of inmate mental health problems she had encountered, from situational depression or anxiety to active psychosis.

The only substantial conflicts between the testimony of Ms. Russell and that of Ms. Swearingen concerned the

extent to which each believed she was compelled to act beyond her competence and the degree to which each felt she had adequate support from medical and mental health staff. Ms. Swearingen testified that she did not feel that she worked outside the scope of her licensure or her competence; that her charts were reviewed daily by a medical doctor; that she had daily discussions concerning her cases with a medical doctor; and that she had complete and open access to psychiatric staff at the Kern Medical Center. *Id.*: 104; *see also* 105-109. She also testified that she had a good working relationship with medical staff, and that members of the staff were responsive to her concerns when she saw an inmate whom she believed might have medical problems. *Id.*: 111.

Ms. Russell's testimony was insufficient to establish that inmates' access to mental health care at the Kern County jails was constitutionally deficient. Despite her subjective feeling that she was being asked to act beyond her competence,[20] her testimony and that of Ms. Swearingen showed that psychiatric technicians at the Kern County jails were performing within the scope of their licensure as defined by the California Business and Professions Code. Psychiatric technicians are defined, *inter alia*, as persons having direct responsibility for the application of interpersonal and technical skills in the observation and recognition of symptoms and reactions of recipients or patients, for the accurate recording of such symptoms and reactions, and for carrying out treatments and medications as prescribed by a licensed physician and surgeon (which includes a psychiatrist). Cal. Bus. & Pro. Code, § 4502(b) (1986 & Deerings' Supp. 1991). Nothing in this definition proscribes

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[20] While there was some effort made by the defense to question the motivation of Ms. Russell, this court does not find that her beliefs were not sincerely held.

making an initial diagnostic impression or recommendation for psychotropic medication.

In sum, this court does not find that there were insufficient numbers of trained mental health personnel to provide for the individualized identification and treatment of treatable inmates suffering from serious mental health disorders.

4. Mental Health Care Records

The fourth essential component of constitutionally adequate mental health care treatment in a prison setting is that accurate, complete and confidential records of the mental health treatment process must be maintained. Plaintiffs rely on the testimony of Dr. Corey Weinstein to support their argument that the mental health record keeping procedure at the Kern County jails is constitutionally inadequate. Dr. Weinstein testified that the mental health care records were kept together with the medical records at the Kern County jails. His testimony states only that he found the records deficient because they did not "reflect the safety for initiation of any psychotropic medication from a medical point of view." RT 5/10/91: 179 at 12-14. This testimony reflects Dr. Weinstein's disagreement with the prescription of psychotropic medications before a complete medical evaluation is had, and does not indicate a problem with the records themselves. In fact, a review of the medical and mental health care files of those inmates who testified, Bobby Gilbert and Gerald Mitchell, shows many notations concerning the mental health care received by these inmates. Plaintiffs have not shown that the mental health record-keeping practices at the Kern County jail are constitutionally deficient.

5. Psychotropic Medications

The fifth essential component of constitutionally adequate mental health care as defined by *Balla* is that psychotropic medications must be prescribed and administered in a safe manner and with appropriate supervision and periodic evaluation. *Balla, supra*, 595 F.Supp. at 1577. Both Ms. Russell and Ms. Swearingen testified concerning the means by which psychotropic medication is prescribed for and delivered to inmates at the Kern County jails.

Ms. Russell recounted an incident that occurred in June, 1990, when she was visiting a inmate-patient who had been prescribed Haldol but who refused to take it, and who was actively hallucinating. Ms. Russell recommended changing the prescription from Haldol to Mellaril. To determine the appropriate dosage of Mellaril, Ms. Russell testified that she relied on a reference book that showed the relative strengths of Mellaril and Haldol, but that she misinterpreted the information and consequently recommended an excessive dosage of Mellaril. She testified that a physician at the jail, Dr. Unger, initially refused to co-sign her recommendation because he felt that the recommended dosage was excessive, but after consulting with Ms. Russell and after she showed him the reference on which she had relied, Dr. Unger did co-sign the recommendation. She testified that she became uneasy later that night, called the night nurse at the facility, and discovered that the inmate had taken the initial dose of Mellaril but had not taken any additional doses because he had gone to sleep. She testified that the next morning she recommended that the Mellaril be discontinued, that this recommendation was followed, that another psychiatric technician persuaded the inmate to agree to take Haldol, and that the inmate thereafter

returned to his original medication, Haldol. *Id.*: 48-49; 51 at 19-25; 52 at 1-18

Ms Swearingen also testified about this incident. She testified that the staff met and discussed this incident and determined that no such recommendations should be made without first consulting with a psychiatrist. RT 5/19/91: 109-110.

Ms. Swearingen contradicted Ms. Russell's testimony concerning the psychiatric technicians' practice of recommending medication for an inmate who has no verifiable prior history of receiving psychotropic medications. *Id.*: 104 at 5-7. The salient point of the testimony of both witnesses on this issue, however, is their agreement that, to their knowledge, medical staff responsible for distributing medications, including psychotropic medications, would not distribute a medication simply on the basis of a psychiatric technician's recommendation, and that a medical doctor reviewed and signed off on the recommendations prior to distribution of any medication. *Id.*: 97; *cf.* RT 3/4/91: 67-70.

Ms. Russell's testimony concerning her erroneous recommendation to substitute one psychotropic medication for another establishes, at most, a single instance of negligence. Ms. Swearingen's testimony confirms that this was an isolated instance. Plaintiffs' assertion that this error occurred because of a practice by physicians of rubber-stamping the psychiatric technicians' medication recommendations is belied by Ms. Russell's testimony that Dr. Unger initially refused to sign off on the prescription and reviewed the recommendation with Ms. Russell. That he did not, in this instance, correct any error before the medication was administered, does not support a broad finding that the prescription and administration of psychotropic medications at the Kern County jail is done in a constitutionally defective manner.

6. Suicidal Inmates

The sixth and final element of constitutionally adequate mental health care is that there be a basic program for identifying, treating, and supervising inmates with suicidal tendencies. Plaintiffs ask the court to order defendants to "[Implement] . . . a program for the identification, treatment and supervision of prisoners with suicidal tendencies without the use of the rubber room/ safety cell for suicidal prisoners. No suicidal prisoner is to be placed in IRC-5." IRC-5 is the safety cell at the Central Receiving Facility.[21] From the relief requested and the showing at trial, it is clear that plaintiffs' focus is not on the general program for identifying, treating or supervising suicidal prisoners, but on the use of the safety cells.[22]

Plaintiffs presented the testimony of an inmate, Irasema Ramirez, who had been housed in IRC-5 in May, 1990. She stated that, during the booking process, someone had asked her if she was going to commit suicide, and she replied that she was. RT 3/4/91: 184 at 9-15. Ms. Ramirez further testified that she responded to the booking person's inquiry as to how she was going to commit suicide by putting her hands to her throat and replying, "Like this." She stated that she was not really serious, but that the person interviewing her took her seriously, and that, as a result, she was immediately taken to IRC-5, stripped of all her clothes, shackled with

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[21] For a general description of the appearance, function and use of the safety cell IRC-5, see the testimony of plaintiff's witness Sheriff's Sergeant Michael Bradley, RT 3/4/91: 125-149, 165-168.

[22] At the time the court inspected the Kern County jails, in March, 1991 there were two safety cells: one, IRC-5, was at the Central Receiving Facility; the other was in the Lerdo Maximum-Medium Facility, which is now being used to house county jail inmates.

her hands to a waist chain and further shackled to a sewer grate in the safety cell. She testified that she was in that cell for "several days," that she was not given clothing during that entire time, that she had to sit on the floor, that she was not given a mattress, that the cell stank of excrement, and that it was very cold. She further stated that she was not given food or water during this time, that she was held incommunicado, that she was not given a blanket, and that officers were staring at her and making jokes. She also testified that the window was always kept covered, and that it was always dark. *Id.*: 185-89. She testified that she was afraid of the dark, and that she was screaming and hysterical during the entire time she was locked in IRC-5. *Id.*: 189.

On cross-examination, Ms. Ramirez testified that she was prosecuting a lawsuit against the county seeking damages for injuries she allegedly suffered as a result of her treatment in May, 1990. When questioned about her recollection of a conversation with a nurse that took place on the night she was booked in and placed into IRC-5, during which she stated that she was under the influence of PCP and that she was concerned she might be pregnant, Ms. Ramirez stated that she did not recall having such a conversation, that she was not under the influence of PCP, and that she was not concerned that she was pregnant. *Id.*: 191 at 18-24. She testified that she had been taking Haldol at the time she entered the jail and that she had been deprived of her Haldol while she was in jail. *Id.*: 193 at 3-4; 195 at 17-25; 198 at 4-6. She denied refusing to take Haldol during her incarceration. *Id.*: 197 at 22-23. She admitted telling a psychiatric technician that she was hearing demons. *Id.*: 196 at 3-5. She testified that she did not recall the time when she was arrested, the time she was booked, or the time she was taken from IRC-5 to a suicide watch cell

upstairs, but she denied that she was placed in IRC-5 and then removed from IRC-5 and taken to a regular suicide watch cell that same night. *Id.*: 224 at 19-15; 225 at 1-18.

Defendants presented the testimony of Naomi Anderberg, a Kern County deputy sheriff. Ms. Anderberg testified about Ms. Ramirez' placement in IRC-5 on May 28, 1990. She testified that she was working an overtime shift at the Inmate Reception Center (IRC) at the Central Receiving Facility on that date. Ms. Anderberg testified that she was told by a sergeant to go to the booking booth to deal with a report that Ms. Ramirez was on the floor of the booking booth attempting to choke herself. Ms. Anderberg testified that when she entered the booking booth, she saw Ms. Ramirez, who was known to her, sitting on the floor in a corner of the booth with her hands on her own throat in a choking position, but not squeezing. Ms. Anderberg testified that she touched Ms. Ramirez' hand, and that thereupon Ms. Ramirez responded by standing up, crying and saying that she did not want to be there, that she was hearing voices telling her they were going to hurt her, that she would find some way to hurt herself, and that she would keep trying until she did succeed in hurting herself. RT 4/18/91: 77-78; see also Defendants' Exhibit DDDDDD.

Ms. Anderberg testified that she led Ms. Ramirez out of the booking booth and took her upstairs to a cell used for observing suicidal prisoners; that Ms. Ramirez was fully clothed in the clothing she wore at the time of her arrest; and that Ms. Anderberg and another deputy escorted Ms. Ramirez to the observation cell. Ms. Anderberg testified that the observation cells on C-Deck, C-006 and C-007, were regular cells with bunks and toilet-sink-fountain combinations but were used for housing suicidal prisoners because the duty officer on C-Deck could observe them from his or her station. *Id.*:

88. Ms. Anderberg testified that she and another female deputy had Ms. Ramirez remove her clothing and prepared to replace it with paper clothing, but that at that point Ms. Ramirez stated her intent to choke herself with the paper clothing. Thereupon, Ms. Anderberg decided not to clothe Ms. Ramirez, and placed her in the observation cell.

Ms. Anderberg testified that, as soon as Ms. Ramirez was locked in the observation cell, Ms. Ramirez began banging her head on the cell bars. Ms. Anderberg testified that, at that point, she decided to remove Ms. Ramirez to the safety cell, where the walls and floor were comparatively soft and there was no metal bunk or toilet. Ms. Anderberg testified that she wrapped Ms. Ramirez in a sheet and took her back downstairs to IRC-5. *Id.*: 80-83.

Defendants offered in evidence a suicide watch log kept on Ms. Ramirez and Ms. Anderberg testified concerning this document. She stated that she and Deputy Julie Linders made the observations recorded thereon during the time that Ms. Ramirez was in IRC-5 and that the observations were made every 15 minutes. The entries are initialed either "NA" or "JL". She stated that, to her knowledge, no male deputy observed Ms. Ramirez while she was in IRC-5. She further testified that, while Ms. Ramirez was in IRC-5, she was in a waist chain, described as a chain that goes around the inmate's waist with two attached shorter lengths of chain to which, in turn, handcuffs are attached, and that this was done to prevent Ms. Ramirez from chocking herself. *Id.*: 84. Ms. Anderberg testified that Ms. Ramirez did not appear to be in physical distress or hysterical, that she was not screaming, and that, if she had been, this would have been recorded on the suicide watch log. *Id.*: 85. Instead, the log records only that Ms. Ramirez was

standing, sitting or sleeping. Defendant's Exhibit EEEEEE.

Ms. Anderberg further testified that she requested a nurse to examine Ms. Ramirez and that a nurse did examine her within two hours after Ms. Ramirez was placed in the cell. The suicide watch log supports this. Defendants' Exhibit EEEEEE. Ms. Ramirez' medical records reflect that she was examined by a registered nurse and that Ms. Ramirez told the nurse she was under the influence of PCP and was hearing demons and that she thought she might be pregnant. Defendants' Exhibit DDDDD, Entry for 5/28/90; *see, also,* Initial Screening Pregnancy Questionnaire, responses to questions "Are you pregnant?" and "Have you used drugs or alcohol within the past 24 hours?"

M. Ramirez' medical and jail records show that she was booked into the Inmate Reception Center on May 28, 1990 at 6:30 p.m., that she was placed into IRC-5 at 6:45 p.m., that she was seen by a nurse at 8:30 p.m., and that she was taken out of IRC-5 and returned to the suicide observation cell, C-006, at 8:45 p.m. that same night. The log, which was kept until June 4, 1990 when Ms. Ramirez was taken off suicide watch, shows that she remained in C-006 from 8:30 p.m. on May 28, 1990 until 8:30 a.m. on June 4, 1990.

Ms Ramirez' medical records also show that, contrary to her testimony, she did receive Haldol during her incarceration, but that it was discontinued after she persistently refused to take it. Follow up entries show that Ms. Ramirez reported she was doing well without the Haldol. Defendants' Exhibit DDDDD, Entries for 5/30/90, 6/8/90, 6/25/90, 7/25/90, 8/15/90, 9/5/90; Medication Record, Entries for 6/3-6/25/90. These entries also show that she was seen by a psychiatric technician and evaluated on May 29, 1990, while she was in the observation cell on C-Deck, and that he

recommended continuing the suicide watch in her present housing and recommended that she be given a paper gown but kept in shackles. Defendants' DDDDD, Entry for 5/29/90. Her records also show that she was seen by psychiatric technicians on May 30, 31, June 1, 2, 3 and 4, 1990, in addition to several personal contacts with medical personnel including a physician, and that the suicide watch was discontinued on June 4, 1990. Defendants' Exhibit DDDDD. The records indicate that she was given a mattress but no blanket on June 2, and a blanket on June 3, 1990. Jana Swearingen testified that inmates on suicide watch were given paper clothing to avoid the risk that they might hang themselves, and that they were not ordinarily given a blanket. RT 4/18/91: 115, 129. The record also shows that Ms. Ramirez was permitted to visit her sister on June 3, 1990.

The records also show that Ms. Ramirez was rebooked into the Kern County jail on November 23, 1990, that the booking slip stated that she had attempted suicide in the past, and that, accordingly, a psychiatric technician attempted to examine her. The record shows that Ms. Ramirez refused to be examined, threatened to file a lawsuit against the psychiatric technician, and stated that she was not suicidal and did not want mental health services. Defendants' Exhibit DDDDD. Her medical records show that she did not manifest symptoms or request treatment for mental health problems from November 23, 1990 until shortly before she testified before this court in March 1991.

Ms Ramirez' testimony is contradicted by the record kept by correctional, medical and mental health personnel in many material respects, including the amount of time she was kept in IRC-5. Except for Ms. Ramirez' testimony, plaintiffs have not offered evidence that these records were falsified. The records show that Ms. Ramirez was immediately identified upon her reception

into the Kern County jails as suicidal, that immediate action was taken, including an examination by a registered nurse and a determination of appropriate protective housing, and that Ms. Ramirez thereafter received treatment until it was determined safe to discontinue the suicide watch. The record also shows that follow-ups were done by psychiatric technicians who questioned her concerning her feelings about suicide as late as September 18, 1990, at which time she appears to have been released. The psychiatric technicians followed Ms. Ramirez again upon her re-entry into the jail in November, 1990, and determined that she did not manifest suicidal ideation during this time or up to the time she offered her testimony. Accordingly, this Court finds that plaintiffs have failed to show that defendants do not have an adequate program for identifying, treating, and supervising inmates with suicidal tendencies.

In making this finding this court has considered the testimony of Kathleen Mayfield, another inmate placed on suicide watch although not in the safety cell. She testified that she did not recall whether she was placed in IRC-5 when she was first booked into the Kern County jail but that she did recall being on suicide watch in an observation cell in the infirmary at Lerdo Pretrial. Although she testified to discomfort from having no blanket on her first night in the infirmary cell, to discomfort from having to wear paper clothing and from the lack of privacy occasioned by being observed every 15 minutes while she was on suicide watch,[23] all of these measures are reasonable to prevent suicide. Ms. Mayfield denied that she was suicidal at any time, but admitted that she "cried a great deal" and was in a "state of shock." RT 4/23/91: 50 at 21-26. These manifestations could reasonably lead staff to identify Ms.

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[23] RT 4/23/91: 48-51; 65-66.

Mayfield as suicidal, despite her assertions to the contrary. Her complaint, *inter alia*, was that the psychiatric technician asked her every morning if she felt suicidal. While this may have displeased her, it indicated only an oversolicitousness for potentially suicidal inmates, not a lack of care.

Plaintiffs also ask for an order to compel defendants to discontinue using the safety cells as a means of controlling inmate behavior. None of the testimony offered on this issue at trial indicated that the safety cells had been inappropriately used as more than a temporary measure to control violent inmates until they "cooled down" sufficiently to be released from those cells. *See, e.g.*, RT 3/5/91: 401-403 (Testimony of Deputy Money)' 413-415, 422, 426-430 (Testimony of Robert Lee). The experts testifying on this issue agreed that safety cells could appropriately be used for this purpose. See RT 4/11/91: 106-109 (Testimony of Dr. Frank Rundle); 4/15/91: 133-36 (Testimony of Ray Nelson); 4/17/91: 40-44 (Testimony of Ray Coleman). Decisions to use the safety cell as a temporary expedient to control violent inmates fall within the category of decisions by correctional administrators regarding the maintenance of internal order and discipline to which this court must give "wide-ranging deference."[24] *See*

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[24] Mr. Robert Lee's testimony was particularly affecting, in that he testified that he had a short tempter and that some of the correctional staff knew this and deliberately provoked him to lose his temper, whereupon he would become violent and be constrained in a safety cell. Nonetheless, by his own admission, Mr. Lee became uncontrollably violent on each of the three occasions ending with his being so placed. Mr. Lee is a powerfully-built man over six feet tall, who on one occasion managed to punch through thick safety glass in an observation cell, as the court observed during its tour. There is no basis on which the court may conclude that the provocation to which Mr. Lee testified was the result of a policy or practice promulgated by the defendants to this action, or that the use of a safety cell was

(continued)

Bell v. Wolfish, supra, 441 U.S. at 547.

7. Translators for Monolingual Spanish-Speaking Inmates

This is a general medical care issue rather than a specific mental health care issue. It is discussed here because that corresponds to the order of its presentation. Plaintiffs presented at trial the testimony of one monolingual Spanish-speaking inmate[25] who stated that he had had one instance when he could not communicate a medial problem during sick call because he had no one to translate for him. RT 3/5/-8/91: 382-383 (Testimony of Jorge Luna aka Joel Ramirez). This inmate, however, testified on cross examination that he had received frequent medical and mental health treatment during his incarceration at the Kern County jails. *Id.*: 352-373. He did not report another incident in which he had been unable to communicate with medical or mental health staff due to his inability to speak English.

Plaintiff's medical expert witness, Dr. Corey Weinstein, testified that during his observation of the sick call procedure at the Kern County jails he witnessed a specific instance in which a bilingual inmate translated for a non-English speaking inmate during sick call. RT 4/10/91: 47 at 21-25, 48 at 1-3. Dr. Weinstein presumed that this instance was representative of

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(fn. continued)
inappropriate after he responded to the alleged provocation and became violent. Having said this, the court also commends Mr. Lee on his courteous courtroom demeanor during his testimony.

[25] Plaintiffs also presented the testimony of another inmate who testified that he, in fact, spoke English with a psychiatric technician despite the fact that the psychiatric technician spoke Spanish. RT 3/5/-8/91: 368 (Testimony of Mateas Diaz aka Pragedes Rodriguez).

standard procedure, and that the medical staff had recruited the bilingual inmate to act as a translator.

This presumption was tacitly affirmed by Opal Kilgore, the supervising nurse at the Lerdo facilities, who testified that, if an inmate presented at sick call and could not speak English, she would either have a custodial officer or nurse translate, if possible, or would have the officer bring a bilingual inmate to translate. In some cases, she testified, the inmate would choose his own inmate translator; the clear implication was that, in the remaining instances, the inmate translator was chosen for the inmate seeking medical care. RT 4/9/91: 71 at 22-25, 72. This use of inmate translators represents an obstacle to access to medical or mental health care for monolingual Spanish speaking inmates because it might require them to disclose information they would prefer not to have communicated to other inmates; inmates may be deterred from seeking medical assistance under these circumstances.

Plaintiffs request an order requiring defendants to provide a member of staff, preferably medical staff, to translate medical interviews for Spanish speaking prisoners.[26] This court will recommend that this request be granted.

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[26] Dr. Weinstein testified that, in his opinion, translators should be required to be proficient in both medical vocabulary and street slang. RT 4/10/91: 130, 131 at 1-3. There is no evidence that constitutionally adequate access requires this specialized training. Judicial notice may be taken of the fact that most patients seeking health care are not themselves trained in medical vocabulary, and do not communicate in those terms.

F. Administrative Segregation

Plaintiffs raise two separate issues concerning administrative segregation. The first is the length of time that prisoners are administratively segregated on the basis of referral for evaluation by a psychiatric technician. The second is the lack of discretion inherent in a policy that classifies all administratively segregated inmates as having "walk-alone" status, i.e., as being unsuitable for joint recreation, housing or exercise with other segregated inmates.

Dennis Wilson, a senior deputy sheriff and the classification officer for the Kern County jails, testified extensively on administrative segregation policies and practice. RT 4/16/91: 20-90.

1. Segregation Pending Mental Health Evaluation

Deputy Wilson testified that inmates with certain mental health problems may be assigned to protective custody or administratively segregated based on information that their behavior may result in their being harmed or threatened by other inmates. If it is suspected that an inmate suffers from this kind of problem, either upon reception into the jail system or during incarceration, Deputy Wilson testified that the practice would be to refer them to the a psychiatric technician for evaluation. Referrals may be made by correctional staff, including classification staff officers, and by medical staff. He testified that classification staff reviewed the status of the mental health referrals after four days. *Id.*: 82-85.

According to Deputy Wilson, classification staff does not always receive the results of mental health referrals

within four days. There was no evidence, however, that inmates administratively segregated because of suspected serious mental health problems are not seen by mental health staff within those four days. Nor did plaintiffs present other testimony showing that mentally-ill prisoners were not seen promptly by mental health staff. Accordingly, the court finds that there is no basis in the evidence to order the relief sought on this issue.

2. Lack of Joint Recreation and Exercise

Deputy Wilson testified generally regarding the bases for classifying inmates for placement in administrative segregation. He testified that "orange band inmate and the civil detainees" are placed in Administratively Segregation. RT 4/16/91: 46 at 4-7. Orange wristbands are given to high risk protective custody inmates. *Id.*: 31 at 8-23. Among those assigned orange wristbands, according to Deputy Wilson, are: former police officers, former correctional officers, persons accused of notorious crimes who might thereby by subject to attack by other inmates, and generally those who are at high risk of either assaulting or being assaulted by other inmates. *Id.*: 46. Civil detainees are those inmates being held because of civil contempt orders. *Id.*: 47.

The other types of inmates housed in administratively segregation are other protective custody inmates ("blue band"), security risk[27] inmates ("red band"), combination protective custody-security risk inmates ("blue-red combination"), and some general population inmates

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[27] Deputy Wilson stated that a security risk, or "red band" inmate, was one who was assaultive toward other inmates, or an escape risk, including those sentenced to state prison and awaiting transfer, or one who has smuggled contraband into the jail. RT 4/16/91: 57 at 18-25; 59 at 4-9.

("white band") who might require temporary segregation. *Id.*: 48. As an example of this last category of inmates, Deputy Wilson stated that persons with mental health problems being stabilized on medication might be held temporarily in administrative segregation until the stabilization has occurred. *Id.*: 48 at 17-25, 49 at 1-4.

As a matter of classification policy, administratively segregated inmates are permitted neither to have dayroom access together nor to exercise together. Since administratively segregated inmates are also single-celled, the obvious result is that these inmates are isolated from all other inmates. *Id.*: 53; 56. Deputy Wilson testified that administratively segregated prisoners were so placed because they "cannot be around one other person without direct absolute control of . . . their movement and behavior. And that even means be out in the day room with other folks, even one other person. The potential could be there that they can either be harmed or they're going to harm someone else." *Id.*: 56 at 21-25; 57 at 1.

Plaintiffs presented Deputy Wilson with a hypothetical example of two police officers who, together, perpetrated a crime and were housed at the Lerdo Pretrial Facility. Deputy Wilson testified that, because they were police officers, they would be classified as having high protective custody needs, would receive orange wristbands, and would be administratively segregated. He further acknowledged that these officers would not be permitted to go to the dayroom or to exercise together because of their classification and also because, as codefendants, "there might be a conflict between the two officer over their getting caught." When the hypothetical was changed, however, to one involving two gang members without protective custody needs, Deputy Wilson conceded that these inmates, because they would not be administratively segregated, would be permitted

to have dayroom access and to exercise together. *Id.*: 76-78. Thus, the distinction between the two hypotheticals is plainly that the two police officers would be in the administratively segregation unit while the two gang members would not be, not because the two officers would be presumed at risk of greater conflict with one another over the circumstances of their apprehension.

Another category of inmate who might be administratively segregated is the inmate who, because of a medical condition such as AIDS is at risk of being assaulted by other inmates. Deputy Wilson testified that, as a general rule, an inmate with AIDS would not be administratively segregated, but when that inmate is being transported back and forth to court and thus exposed to risk from other inmates, he or she would be so classified, with all the implications of that classification for exercise and housing. On the other hand, an inmate with AIDS who was not being transported would probably be classified as a general population inmate who would remain within the infirmary unit. RT 4/16/91: 79-82.

The detrimental effects of isolation in administrative segregation were testified to by a number of inmates, but perhaps most articulately by Kathleen Mayfield. She testified that persons so isolated would often break down completely and would receive psychotropic medications. RT 4/23/91: 56-57; *see also*, RT 3/5-8/91: 247 at 17-25; 248 at 1 (Testimony of Jo Lynn Vann).

As a general rule classification decisions are committed to the discretion of correctional authorities and receive wide-ranging deference by the courts. Persons may, without offense to the Constitution, be administratively segregated for their own protection when appropriate. *See, e.g., Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987). In this case, however, the issue is not whether defendants may constitutionally segregate inmates with protective custody needs; it is

whether, once such inmates have been so segregated, there is any penological justification for always keeping all of them in total isolation from each other based solely on their classification. The testimony of plaintiff's expert witness, Raymond Nelson, is very instructive on this point.[28] He stated that the determination that an administratively segregated inmate should exercise alone should be a "judgment call" based on an assessment of the individual prisoner or a matter of procedure, i.e., that the decision inheres in the classification itself. His further opinion was that inmates should be evaluated individually. As head of the Federal Bureau of Prisons, he utilized a system of individual evaluation, except for those inmates who were segregated for disciplinary reasons. RT 4/15/91: 158-160. This court finds that the classification termed administrative segregation by the Kern County Jail is so inclusive that its use would offend the Constitution unless complemented by a system for review of the inmates' exercise and dayroom status.

Although the classification system at the Kern County jails is generally highly sophisticated and is based on a careful consideration of the individual inmate's case factors, the ability of classification officers to make informed choices ceases at the moment that an inmate is classified as an administrative segregation inmate. There must be room for the exercise of discretion in determining whether individual inmates with high

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[28] Mr. Nelson's relevant experience includes positions as Associate Director of Corrections, Washington, D.C.; Assistant Commissioner of Corrections of New York, New York; Director of Corrections, Denver, Colorado; Warden, Chicago Metropolitan Correctional Center, Chicago, Illinois; Warden, Danbury Federal Correctional Institution; Chief of the Jails Division, National Institute of Corrections; and as a court-appointed expert witness in numerous jail and prison conditions cases in the federal courts. RT 4/15/91: 42-48.

protective custody needs, or those who are administratively segregated for medical or mental health reasons, must uniformly be placed on "walk-alone" status. Defendants should be required to adopt a policy allowing classification and custody staff to exercise discretion to determine which among those prisoners classified as protective custody inmates housed in administrative segregation might exercise together with reasonable safety and/or have dayroom access together with reasonable safety.

G. Law Library Access

Plaintiffs request orders mandating defendants to permit inmates to have prompt physical access to an adequate law library, the assistance of other inmates in doing legal research and preparing legal documents, the assistance of Spanish-speaking translators for monolingual Spanish-speaking inmates, and the receipt of legal materials through the mail

The parties agreed before trial on a policy governing the contents of the law library at the Kern County jails, and this will be incorporated into the final order offered to the district court. During trial it emerged that the written policy governing law library access did not conform to the actual policy or practice. A revised written policy has now been adopted. RT 4/23/91: 19-20; Defendants' Post Trial Brief, Exhibit E, Declaration of Chief of Detentions Robert Fisher and copy of revised policy. As to the remaining matters on which plaintiffs seek orders, there was no testimony at trial that would indicate that inmates do not have constitutionally-adequate law library access, access to the assistance of other inmates, or any of the other matters encompassed by the proposed order. These requests of plaintiffs should be denied.

H. Probable Cause Hearings

Plaintiffs request an order requiring the sheriff to release any person arrested without a warrant who does not receive a prompt judicial determination of probable cause, the delay not to exceed 48 hours from arrest, including weekends and holidays.

At the time of trial, the issue of prompt probable cause hearings was before the Supreme Court in *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991). Approximately one month after trial ended, the Supreme Court handed down its decision in *McLaughlin*. The Court held that probable cause determinations must be held as soon as feasible after a warrantless arrest, but in no event later than 48 hours after the arrest, including weekends and holidays. Following the decision in *McLaughlin*, the courts in Kern County have adopted a new policy[29] conforming to the requirements of *McLaughlin*. Defendants' Post Trial Brief, Exhibit G, Declaration of Charles B. Pfister, Presiding Judge, Kern County Municipal Court District with attached memorandum

This court will recommend that plaintiffs' request in this area be denied.

I. Posting and Access

Finally, plaintiffs request orders that the final judgment in this action be posted throughout the Kern County jails, together with the names, addresses and

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[29] Under the former policy, probable cause for detention hearings were held at the same time as arraignment, during the arrestee's first appearance before a magistrate judge. State law required that this appearance take place within two days of arrest, exclusive of weekends and court holidays. Cal. Penal Code § 825.

telephone numbers of plaintiffs' counsel. They also request an order permitting plaintiffs' counsel to have "reasonable access" to the facilities, prisoners and records of the Kern County jails, including "unlimited, unannounced access" to the jails and to jail records except medical and mental health records. Plaintiffs also request that defendants be ordered to provide them with copies of revised jail and medical policies as part of the normal distribution of such revisions. They request a court order permitting them to bring a motion for attorney's fees and costs within 30 days of the entry of judgment, together with a provision that "Any such award will not preclude further awards for monitoring and enforcement as reasonably necessary."

Only the first provision of this request should be granted. Plaintiffs' counsel do not need to be invited (or ordered) to bring a timely motion for attorneys' fees and costs. Granting them the access that they seek would be tantamount to appointing them as monitors to insure that the provisions of the court's permanent injunction are carried out. This appointment is not warranted.

IV. CONCLUSION

Based on the foregoing analysis, IT IS HEREBY RECOMMENDED that a permanent injunction issue containing the following terms:

A. The system-wide inmate population at the Kern County jails shall not exceed a total of 2,330 inmates. The rated capacity for each of the following jails will be as follows and will not be exceeded:

1. Kern County Receiving Center: 282 inmates;
2. Womens' Minimum Facility: 96 inmates;
3. Mens' Minimum Facility: 704 inmates

(this figure may be adjusted so long as the total population remains within the overall cap);

4. Lerdo Pretrial Facility: 1,232, in accordance with the pilot program approved by the Board of Corrections on July 18, 1991.

B. To meet the population limits set above, the sheriff or his designee may release prisoners when the total population of the jails or the population of any housing unit within the jails has reached ninety percent of the population limit, and the sheriff or his designee shall release prisoners when the total population of the jails or any unit hereof reaches one hundred percent of the population limit.

C. Defendants shall not operate the Lerdo Maximum/Medium Facility without a full complement of four correctional staff present at each observation post in the medium custody dormitory sections of the facility.

D. Defendants shall provide a Kern County jail staff member, preferably a member of the medical staff, to translate for Spanish-speaking inmates during medical and mental health interviews if the inmate so requests.

E. Defendants shall develop and file with the court a written policy proposal allowing classification and custody staff at the Kern County jails to exercise discretion to determine which among those prisoners classified as high protective custody need inmates and housed in administrative segregation based on that classification may safely exercise together and/or have dayroom access together. This proposal shall be filed with the court within 90 days of the date of the permanent injunction. Upon the district court's approval, defendants shall implement the policy forthwith.

F. The following provisions of the Offer of Judgment filed with the court on February 21, 1991 shall be incorporated into the permanent injunction:

1. Defendants shall supplement their existing law library located in the Lerdo Pretrial Facility to include the following books and publications:

a. Federal Reporter Second (1960 to date);
b. Shepard's Federal Reporter Second Citator;
c. Federal Supplement (1960 to date);
d. Shepard's Federal Supplement Citator;
e. *Federal Civil Procedure Before Trial*, the Rutter Group;
f. *California Criminal Procedure*, Witkin;
g. *California Evidence*, Witkin;
h. *Handbook of Federal Habeas Corpus Manual* (2nd Edition), Sokol;
i. *Federal Rules*, West Publishing;
j. *State Rules*, West Publishing;
k. *Legal Research in a Nutshell*, Cohen;
l. *Legal Research, Writing & Analysis*, West Publishing;
m. *Criminal Procedure in a Nutshell*, Israel & LaFave;
n. Prisoner Union Pretrial Legal Materials;
o. Prisoner Union Post Conviction Materials;
p. Supreme Court Reporter, Volumes 18, 19, 25, 26 and 27 (replacements for missing volumes); and
q. Black's Law Dictionary (replacement for missing volume).

2. Defendants shall clarify and document their procedures for providing inmates housed in other Kern County jails meaningful access to the Lerdo Pretrial law library through either regular transportation to Pretrial or through a permanent rehousing at Pretrial. Defendants shall inform Kern County inmates of the Pretrial law library through the inmate orientation booklet.

3. Effective September 10, 1990, no prisoner will be housed in the Kern County jails who does

not receive a bed, bedding, and mattress. There will be no prisoners sleeping on the floor.

G. Defendants shall post copies of this judgment throughout the Kern County jails, together with the names, addresses and telephone numbers of plaintiffs' counsel.

IT IS FURTHER RECOMMENDED that in all other respects, plaintiffs' requests for injunctive relief be denied.

These findings and recommendations are submitted to the Honorable ROBERT E. COYLE, Chief Judge of the United States District Court, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District court's order. *Greenhow v. Secretary of Health and Human Services*, 863 F.2d 633 (9th Cir. 1988).

DATED: March 19, 1992.

/s/ John F. Marshall
United States Magistrate Judge

JFM:ca:cw

[CERTIFICATE OF SERVICE OMITTED]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

FILED
OCT 8 1992
Clerk, U.S. District Court
Eastern District of California
By /s/ Deputy Clerk

JERRY ANDERSON, et al.,
Plaintiffs,

v.

COUNTY OF KERN, et al.,
Defendants.

No. CIV F-90-205 GEB/JFM P

ORDER AND PERMANENT INJUNCTION

THIS IS A CLASS ACTION SUIT BROUGHT PURSUANT TO 28 U.S.C. § 1983 by the inmates of five Kern County jails: the Central Receiving Facility in downtown Bakersfield, which includes the Inmate Reception Center; the Men's and Women's Minimum Facilities at Lerdo; the Lerdo Pretrial Facility; and the Lerdo Maximum/Medium Facility. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On March 20, 1992, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations

were to be filed within thirty (30) days. On March 30, 1992, plaintiffs filed timely objections to the findings and recommendations. On April 11, 1992, defendants filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this court has conducted a *de novo* review of the case and has determined that the magistrate judge's findings and recommendations are supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDER that:

1. The Findings and Recommendations filed March 20, 1992, are adopted in full, with the exception of Section F.2:

> Defendants shall clarify and document their procedures for providing inmates housed in other Kern County jails meaningful access to the Lerdo Pretrial law library through either regular transportation to Pretrial or through a permanent rehousing at Pretrial. Defendants shall inform Kern County inmates of the Pretrial law library through the inmate orientation booklet.

This section of the Rule 68 offer was not accepted and is not included in the permanent injunction.

2. A permanent injunction containing the following terms is hereby issued:

A. The system-wide inmate population at the Kern County jails shall not exceed a total of 2,330 inmates. The rates capacity for each of the following jails will be as follows and will not be exceeded:

1. Kern County Receiving Center: 282 inmates;

2. Womens' Minimum Facility: 96 inmates;

3. Mens' Minimum Facility: 704 inmates (this figure may be adjusted so long as the total population remains within the overall cap);

4. Lerdo Pretrial Facility: 1,232, in accordance with the pilot program approved by the Board of Corrections on July 18, 1991.

B. To meet the population limits set above, the sheriff or his designee may release prisoners or transfer them to another facility where there is adequate space when the total population of the jails or the population of any housing unit within the jails has reached ninety percent of the population limit, and the sheriff or his designee shall release prisoners or transfer them to another facility where there is adequate space when the total population of the jails or any unit thereof reaches one hundred percent of the population limit.

C. Defendants shall not operate the Lerdo Maximum/Medium Facility without a full complement of four correctional staff present at each observation post in the medium custody dormitory sections of the facility.

D. Defendants shall provide a Kern County employee, preferably a member of the medical staff serving the jail, to translate for Spanish-speaking inmates during medical and mental health interviews if the inmate so requests.

E. Defendants shall develop and file with the court a written policy proposal allowing classification and custody staff at the Kern County jails to exercise discretion to determine which among those prisoners classified as high protective custody inmates, and housed in administrative segregation based on that classification may safely exercise together and/or have dayroom access together. This proposal shall be filed with the court

within 90 days of the date of the permanent injunction. Upon the district court's approval, defendants shall implement the policy forthwith.

F. The following provisions of the Offer of Judgment filed with the court on February 21, 1991 shall be incorporated into the permanent injunction:

1. Defendants shall supplement their existing law library located in the Lerdo Pretrial Facility to include the following books and publications:

a. Federal Reporter Second (1960 to date);

b. Shepard's Federal Reporter Second Citator;

c. Federal Supplement (1960 to date);

d. Shepard's Federal Supplement Citator;

e. *Federal Civil Procedure Before Trial*, the Rutter Group;

f. *California Criminal Procedure*, Witkin;

g. *California Evidence*, Witkin;

h. *Handbook of Federal Habeas Corpus Manual* (2nd Edition), Sokol;

i. *Federal Rules*, West Publishing;

j. *State Rules*, West Publishing;

k. *Legal Research in a Nutshell*, Cohen;

l. *Legal Research, Writing & Analysis*, West Publishing;

m. *Criminal Procedure in a Nutshell*, Israel & LaFave;

n. Prisoner Union Pretrial Legal Materials;

o. Prisoner Union Post Conviction Materials;

p. Supreme Court Reporter, Volumes 18, 19, 25, 26 and 27 (replacements for missing volumes); and

q. Black's Law Dictionary (replacement for missing volume).

2. Effective immediately, no prisoner will be housed in the Kern County jails who does not receive a bed, bedding, and mattress. There will be no prisoners sleeping on the floor.

G. Defendants shall post copies of this judgment throughout the Kern County jails, together with the names, addresses and telephone numbers of plaintiffs' counsel.

IT IS FURTHER ORDERED that in all other respects, plaintiffs' requests for injunctive relief be denied.

DATED: October 28, 1992

/s/ Garland E. Burrell, Jr.
Garland E. Burrell, Jr.
United States District Judge

APPENDIX F

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
Chapter 21. Civil Rights

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

§ 1988. Proceedings in vindication of civil rights; attorney's fees

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such

civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994[,], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.

(As amended Nov. 21, 1991, P. L. 102-166, Title I, §§ 103, 113(a), 105 Stat. 1074, 1079; Nov. 16, 1993, P. L. 103-141, § 4(a), 107 Stat. 1489, Sept. 13, 1994, P. L. 103-322, Title IV, Subtitle C, § 40303, 108 Stat. 1941.)

No. 95-294

Supreme Court, U.S.
FILED
SEP 13 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

COUNTY OF KERN and CARL SPARKS, Sheriff,

Petitioners,

v.

JERRY ANDERSON, GLENNA BLAIR, TERRY DAVID, JOHN WARDWELL, JESSE VASQUEZ and IRENE JUAREZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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Questions Presented

1. Did the court of appeals err when it applied deliberate indifference standards in passing on medical conditions of confinement of Kern County jail inmates?

2. Should the Supreme Court review findings that may create attorney fees liability for defendants, or consider whether plaintiff may secure fees for being the catalyst for a jail procedure change, before the district court and the court of appeals make a final decision as to the fee to be awarded, where the court of appeals has vacated the district court's fee award and remanded all fees issues to the district court for consideration in light of the court of appeals decision affirming in part, reversing in part, vacating in part and remanding in part the district court's order on the merits of the case?

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1. There is no significant and recurring issue raised here as to whether the "deliberate indifference" standard is different for eighth and fourteenth amendment medical conditions claims brought by convicted prisoners and pre-trial detainees; nor is there any conflict among the circuits evident here. 8

2. No issue pertaining to attorneys' fees in this case is ripe or otherwise suitable for review at this time by this Court. 11

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No. 95-294

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COUNTY OF KERN and CARL SPARKS, Sheriff,
Petitioners
v.
JERRY ANDERSON, GLENNA BLAIR
TERRY DAVID, JOHN WARDWELL
JESSE VASQUEZ and IRENE JUAREZ,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 45 F.3d 1310 (9th Cir. 1995). It is reprinted in the Petition as Appendix A. The decision was amended by addition of footnote, in an Order filed July 7, 1995, that is reprinted in the Petition as Appendix B. Each set of parties' Petition for Rehearing/Suggestion of Rehearing *en banc* was denied, by Orders reprinted in the Petition as Appendix C (May 19, 1995 Order denying Petitioners' Petition for Rehearing) and Petition Appendix B at B 3-4 (July 7, 1995 Order denying Respondents' Petition for Rehearing).

The district court filed an Order and Permanent Injunction on October 8, 1992. It is reprinted in the Petition as Appendix E. The Order and Permanent Injunction was based on the magistrate judge's Findings and Recommendations, filed March 20, 1992, which are reprinted in the Petition as Appendix D.

The district court also issued an attorneys' fees Order on January 28, 1994, which is reprinted in the Appendix hereto at App 1-2. The Petitioners appealed. The Notice of Appeal is reprinted in the Appendix hereto at App 3-4. The appeal was docketed in the Ninth Circuit separately from the appeal involved in the instant proceedings as Appeal No. 94-15414. At Petitioners' request, the Ninth Circuit vacated and remanded the district court's fee award for reconsideration. A copy of that Order filed May 22, 1995, is included in the Appendix hereto at App 5. Respondents' Motion to Vacate that Order was denied. A copy of that Order, filed June 28, 1995, is in the Appendix hereto at App 6.

The court of appeals also transferred Respondents' application for attorneys fees for appellate work to the district court. That Order, filed July 31, 1995, is included in the Appendix hereto at App 7. A copy of the court of appeal's Order, filed August 31, 1995, denying Petitioner's Motion to Vacate the July 31, 1995 Order is in the Appendix hereto at App 8.

JURISDICTION

The final judgment of the court of appeals was entered January 13, 1995, and amended on July 19, 1995. It is reprinted in the Petition as Appendix B at B 1-2. Petitioners' motion for rehearing was denied by an Order filed May 19, 1995, which is reprinted in the Petition as Appendix C. Respondents' Petition for Rehearing was denied by an Order filed July 7, 1995, which is reprinted in the Petition as Appendix B at B 3-4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983. Civil Action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. § 1979; Dec. 29, 1979, P.L. 96-170; § 1, 93 Stat. 1284).

2. 42 U.S.C. § 1988(b). Proceeding in vindication of civil rights; attorneys' fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, Title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
(As amended Nov. 21, 1991, P.L. 102-166, Title I, §§ 103-113(a), 105 Stat. 1074, 1079; Nov. 16, 1993, P.L. 103-141, § 4(a), 107 Stat. 1489, Sept. 13, 1993, P.L. 103-322, Title IV, Subtitle C, § 40303, 108 Stat. 1941.)

STATEMENT OF THE CASE

Introduction. This is a jail conditions case. Petitioners, who were defendants in the district court, are the County of Kern and Sheriff Carl Sparks. They operate a county jail facility that houses both pretrial detainees and sentenced prisoners. The Respondent inmates, who were plaintiffs in the district court, brought a class action under 42 U.S.C. § 1983, alleging numerous

unconstitutional jail conditions. Some issues were resolved by motion or stipulated settlement. The remainder of the case was tried by a magistrate judge who issued findings and recommendations. Petition Appendix D. The District Court modified and adopted these findings and recommendations, and issued a permanent injunction. Petition Appendix E. Both parties appealed.

The United States Court of Appeals for the Ninth Circuit affirmed in part and revised in part and remanded in part. 45 F.3d 1310, Petition Appendix A. *See also* Petition Appendix B at B 3-4 (July 7, 1995 Order modifying opinion).

Spanish Language Interpreters. One of many issues in the case was whether Petitioners were constitutionally required "to provide a Kern County employee, preferably a member of medical staff, to translate for Spanish speaking inmates who request a translator during medical and mental health interviews"? Petition Appendix A at A 11 (court of appeals Opinion); Appendix E at E 3 (district court Order). In addressing that issue, the Ninth Circuit applied this Court's deliberate indifference liability standard set forth in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), to both the Eighth Amendment rights of convicted inmates and the Fourteenth Amendment rights of pretrial detainees, Petition Appendix A at A 11. It upheld the district court's decision, *see* Petition Appendix E at E 3 (Order) and Petition Appendix D at D 47-48 (Findings and Recommendations), ordering Petitioners to provide such interpreters. Petition Appendix A at A 11-12.

Dental and Vision Care. The magistrate judge made extensive findings about Petitioners' provision of dental and vision care. Petitioner Appendix D at D 13-21. He also expressly found that Petitioners had changed their prior policies; their new policies conformed to constitutional requirements; and there was no basis in the record for finding that Petitioners would fail to honor their new constitutional policies. Hence the magistrate judge recom-

mended that injunctive relief be denied. Petition Appendix D at D 16-18, 19-21. The district court agreed, Petition Appendix E at E 4; as did the court of appeals, Petitioner Appendix A at A 12-13.

On appeal (and here) Petitioners argued that the issue was not moot because the district court had "found that during the course of the proceedings the County had increased the level of services to constitutionally adequate standards," and made these findings "the basis for an award of attorneys fees as a 'catalyst' for change under 42 U.S.C. § 1988." Petitioner at 4. The Ninth Circuit, however, held that the "catalyst" issue "is not ripe", and "should be considered by the district court in the ancillary proceedings regarding attorneys' fees." Petition Appendix A at A 13.

Petitions for Rehearing/Suggestions of Rehearing *En Banc*. In the merits appeal that is the subject of the pending Petition for Writ of Certiorari, both Petitioners and Respondents petitioned the Ninth Circuit for Rehearing and Suggested Rehearing *en banc*.

Petitioners' Ninth Circuit Petition for Rehearing/Suggestion of Rehearing *en banc* addressed only issues concerning Spanish language interpreters. The Ninth Circuit denied that Petition. *See* Petition Appendix C.

The Respondents' Petition for Rehearing/ Suggestion of Rehearing *en banc* addressed the "deliberate indifference" standard of liability to be applied to the "safety cell" and "joint exercise" claims of pretrial detainees. *See* Petition Appendix A at A 3-11 (Ninth Circuit Opinion). After ordering Petitioners' to respond to Respondents' Petition for Rehearing, the court of appeals denied Respondents' Petition for Rehearing/Suggestion of Rehearing *en banc*. Petition Appendix B at B 3-4. The court of appeals, however, amended its Opinion as follows:

> The opinion filed January 13, 1995 is amended to include the following footnote at the end of the second paragraph of Section I, at page 505 of the slip opinion [*see* Petition Appendix A at A 3] and 45 F.3d 1310, 1313:
>
> > We need not decide here whether, under some circumstances, the "deliberate indifference" standards under the Eighth and Fourteenth Amendments diverge. *See Redman v. County of San Diego*, 942 F.2d 1435, 1442-43 (9th Cir. 1991) (*en banc*). The plaintiffs did not differentiate between the two standards in their briefs, and emphasized the Eighth Amendment formulation, which we apply in this opinion. We are convinced that any possible divergence would not have affected the outcome of our decision.

Petition Appendix B at B 3-4

Ancillary Fees Proceedings. There have been numerous ancillary fees proceedings in this case. First, in the district court the magistrate judge filed Findings and Recommendations on December 30, 1993, which were adopted by the district court in an Order filed January 28, 1994. Appendix hereto at App 1-2. Petitioners appealed on or about February 24, 1994. Appendix hereto at App 3-4. The appeal was docketed, separately from the instant appeal, in the United States Court of Appeals for the Ninth Circuit as No. 94-15414.

Subsequent fee proceedings occurred in the district court, pursuant to which the district court stayed enforcement, pending appeal, of the vast majority of the fees previously awarded. Findings and Recommendations were filed on January 17, 1995;

Amended Findings and Recommendations were filed on January 23, 1995 and the district court's order was filed on March 24, 1995.

The Petitioners here moved in the separate Ninth Circuit's fees appeal (No. 94-15414), that the court of appeals vacate the district court's January 28, 1994 original fees order (Appendix hereto at App 1-2) and remand the fees issues to the district court for reconsideration, in light of the Ninth Circuit's January 13, 1995 decision that is the subject of the instant Petition. On May 22, 1995, the Ninth Circuit granted Petitioners' Motion. Appendix hereto at App 5. Respondents' motion to set that Order aside was denied on June 28, 1995. Appendix hereto at App 6.

At Respondents' request, on July 31, 1995, the court of appeals also transferred to the district court Respondents' application for attorneys' fees for appellate work. Appendix hereto at App 7. On August 31, 1995, the court of appeals denied Petitioners' motion to vacate the July 31, 1995 transfer Order. Appendix hereto at App 8. On or about September 5, 1995, Respondents filed the transferred motion for appellate work fees in the district court.

REASONS FOR DENYING THE WRIT

Introduction

The Petition for Writ of Certiorari essentially is frivolous.

First, Petitioners ignore the actual findings made in the district court and the court of appeals, in order to argue without basis that the court of appeals failed correctly to apply this Court's teachings concerning Eighth Amendment rights of prisoners. In fact, the court of appeals applied this Court's Eighth Amendment deliberate indifference standard properly to affirm the district court's decision that Petitioners' failure to provide employee

Spanish interpreters for medical/mental health interviews to Spanish monolingual inmates on request, constituted knowing deliberate indifference to serious medical needs of such inmates. Contrary to Petitioners' assertion, there is no conflict here with this Court's controlling decisions or with decisions of other circuits.

Second, Petitioners ask this Court to review attorneys' fees issues that the court of appeals correctly held are unripe. Petitioners failed, moreover, to inform this Court that the court of appeals had in fact remanded the fees issues, which were the subject of a separate appeal, for consideration by the district court in light of the decision entered in the instant appeal.

1. There is no significant and recurring issue raised here as to whether the "deliberate indifference" standard is different for eighth and fourteenth amendment medical conditions claims brought by convicted prisoners and pre-trial detainees; nor is there any conflict among the circuits evident here.

Petitioners argue that the court of appeals decision below, concerning provision of Spanish language interpreters to prisoners in medical/mental health interviews, conflicts with this Court's decisions in *Wilson v. Seiter*, 501 U.S. 294 (1991) and *Farmer v. Brennan*, 511 U.S. ___, 128 L.Ed.2d 811 (1994), and conflicts with post-*Wilson* decisions of other circuits. Petition at 4-6. It does neither.

Contrary to Petitioners' implications, nothing in the Ninth Circuit's opinion even suggests that the correct standard for liability under the Fourteenth Amendment is less than rigorous, or is as relaxed as "mere negligence." *Compare* Petition at 5 *with* Petition Appendix A (Ninth Circuit opinion).

In this case, the court of appeals stated the liability standard as follows:

> Jail officials violate a prisoner's Eighth Amendment rights if they are deliberately indifferent to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (*same standard applies to pretrial detainees*). The indifference to medical needs must be substantial; a constitutional violation is not established by negligence or 'an inadvertent failure to provide adequate medical care.' *Estelle*, 429 U.S. at 105-06.

Appendix A to Petition at A-11 (emphasis added).

The court of appeals also held that the same standard of deliberate indifference to serious medical needs applies to both convicted and the pretrial inmates. Petition Appendix A at A 11, citing *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) for the proposition that the "same [Eighth Amendment deliberate indifference] standard applies to pretrial detainees." *See also* July 7, 1995 Order, Petition Appendix B at B 4 (stating that the court of appeal applied only the Eighth Amendment formulation in its opinion and that "we are convinced that any possible divergence [between Eighth and Fourteenth Amendment deliberate indifference standards] would not have affected the outcome of our decision.").

Petitioners contend that the court of appeals somehow improperly did not include within its analysis, "a deliberately indifferent state of mind" inquiry or analysis. *See* Petition at 4 and 5. In particular, Petitioners contend that the court of appeals ignored this Court's *Wilson* and *Farmer* decisions, under the Eighth Amendment, which they assert render cruel and unusual only those conditions of confinement that constitute "an objective

deprivation so serious as to rise to the level of a constitutional violation and a subjective 'deliberately indifferent' state of mind." Petition at 5.

However, based upon the record made in the district court, *e.g.*, Petition Appendix D at D 47-48, *compare id.* at D 21-47, the court of appeals properly rendered its decision on the basis of evidence that a failure to provide a staff interpreter can lead to serious medical problems and that through their policies and supervisory personnel Petitioners subjectively and obviously knew of this risk. Petition Appendix A at A 12; *id.* at A 12-13.

Petitioners are also entirely wrong in arguing that the Ninth Circuit's approach to the issue somehow is inconsistent with other circuits in applying "a state of mind requirement to Fourteenth Amendment challenges." Petition at 5. Indeed, as to the precise issue before it, the Ninth Circuit's opinion in the instant case relied upon and was totally consistent with the Seventh Circuit's decision in *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). *See* Petition Appendix A at A 12-13.

Petitioners' contentions amount to little more than a dispute with the court of appeals (and the district court) as to its application of the deliberate indifference standard to the specific facts in this case. That is not a matter appropriate for this Court's review. Resolution of factual disputes is the province of the district courts and courts of appeals. As this Court has stated:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). The "two-court rule" is fully applicable in this case. *See, Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

2. No issue pertaining to attorneys' fees in this case is ripe or otherwise suitable for review at this time by this Court.

At the Petitioners' request, the court of appeals vacated the district court's attorneys' fee award in this case and remanded it for reconsideration in light of the court of appeal' decision that is the subject of the instant Petition for Writ of Certiorari. Appendix hereto at App 5. The remand Order specifically states that the district court is to conduct "further proceedings consistent with *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995)[,]" Petition Appendix A at A 13. In fact, that decision specifically identifies for district court consideration the very issues that Petitioner contends should now be reviewed by this Court. *See* Appendix A at A 13.

Nothing in this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) even hints that this Court should review an attorneys' fee decision before it has been finally decided by a district court and reviewed by a court of appeals. *Compare* Petition at 7. Nothing in this Court's decision in *Farrar v. Hobby*, ___ U.S. ___, 121 L.Ed.2d 494 (1992) suggests such an extraordinary approach to review of attorneys' fees issues either.

Consistent with *Farrar*, in this case the Ninth Circuit, in its remand Orders (Petition Appendix A at A 13 and Appendix hereto at App 5), has provided the district court with direction and opportunity to award the appropriate attorneys' fee in light of "the degree of the plaintiff's overall success" in the litigation. *See*

Farrar, 121 L.Ed.2d at 505, quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 793 (1989) and *Hensley*, 461 U.S. at 436.

Unlike the situation in *Farrar*, 121 L.Ed.2d at 506-511 (O'Connor, J concurring), Respondents' overall victory here certainly was neither pyrrhic nor *de minimus*. *Farrar* involved a purely damages case in which plaintiff who sought $17,000,000 secured $1 as nominal damages. By contrast with *Farrar*, the instant case is an injunctive and declaratory relief case in which Respondents have secured significant relief. Respondents believe their substantial success justifies a full fee, *see, e.g., Hensley*, 461 U.S. at 434-437. Initially, however, that will be for the district court to decide, subject to the Ninth Circuit's appellate oversight.

Contrary to Petitioners' assertion, Petition at 7-8, the Ninth Circuit's decision here also is not in conflict with the Fourth Circuit's *en banc* decision in *S-1 and S-2 v. State Board of Educ. of N.C.*, 21 F.3d 49 (4th Cir. 1994). *First*, the Ninth Circuit has vacated and remanded the fee award for reconsideration by the district court in light of the Ninth Circuit decision rendered here on the merits. Appendix hereto at App 5; *see also, S-1 and S-2*, 21 F.3d at 50-51 (describing the similar process that had brought the fees issue back before the Fourth Circuit). *Second*, unlike in *S-1 and S-2*, the instant appeal and case are not entirely moot as to a given party; only certain elements of the case and appeal are deemed moot due to Petitioners' current compliance with constitutional *minima*. Respondents secured substantial additional relief from Petitioners through settlement and judgment. *Third*, unlike in *S-1 and S-2*, the district court here actually found that at least Petitioners' prior vision care policy was constitutionally infirm. Petition Appendix D at D 21.

Suffice it to say, until an evidentiary record is made and considered in the district court, in light of the Ninth Circuit's

remand of fees issues, the attorneys' fees issues are not ripe for review by either the court of appeals or this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Dated September 18, 1995

Respectfully submitted,
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Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FILED
JAN 28 1994
Clerk U.S. District Court
Eastern District of California

By _____
Deputy Clerk

JERRY ANDERSON, et al.,	)	No. CIV F-90-0205 GEB JFM P
Plaintiffs,	)	
vs.	)	
COUNTY OF KERN, et al.,	)	
Defendants.	)	ORDER

Plaintiffs are proceeding through counsel with this class action lawsuit. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On December 30, 1993, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within ten (10) days and that any replies to objections were to be filed within ten (10) days thereafter. On January 7, 1994, plaintiffs filed timely

objections to the findings and recommendations. On January 13, 1994, defendants filed timely objections to the findings and recommendations. On January 21, 1994, plaintiffs filed a timely reply to defendants' objections.[1/]

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed December 30, 1993 are adopted in full;

2. Plaintiff's motion for attorneys' fees and costs is hereby granted; and

3. Plaintiffs are awarded reasonable attorneys' fees in the amount of three hundred fifty-seven thousand one hundred eight dollars and fifty cents ($357,108.50) and reasonable expenses in the amount of twenty-four thousand seven hundred sixty-two dollars and fifty-eight cents ($24,762.58), for a total award of three hundred eighty-one thousand eight hundred seventy-one dollars and eight cents ($381,871.08).

Dated: January 28, 1994

/s/ Garland E. Burrell, Jr.
UNITED STATES DISTRICT JUDGE

[1/] In their reply, plaintiffs contend, inter alia, that defendants' objections were untimely. This contention is without merit. See Fed. R. Civ. P. 6(a).

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COUNTY OF KERN and CARL SPARKS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY ANDERSON, et al.,	No. CIV F-90-205 GEB JFM P
Plaintiffs/Appellants,	
vs.	
COUNTY OF KERN and CARL SPARKS, SHERIFF,	
Defendants/Appellees.	NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendants, COUNTY OF KERN and CARL SPARKS, SHERIFF, appeal to the United States Court of Appeals for the Ninth Circuit from the Order awarding attorneys' fees filed in this action on January 28, 1994.
Dated: February 24, 1994

B.C. BARMANN, COUNTY COUNSEL

By /s/
Holly N. Gallagher, Deputy
Attorney for Defendants,
COUNT OF KERN and CARL SPARKS

LAW OFFICE OF JOHN HAGAR

By /s/ John Hagar/Hg
Attorney for Defendants,
COUNTY OF KERN and CARL SPARKS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAY 22 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JERRY ANDERSON, et al.,	)	No. 94-15414
	)	
Plaintiff/Appellee,	)	D.C. No. CV-90-00205-GEB
	)	
vs.	)	
	)	
COUNTY OF KERN; CARL SPARKS, Sheriff,	)	
	)	
	)	
Defendants/Appellants.	)	ORDER
	)	

Defendants-appellants' motion filed on May 10, 1995 is GRANTED. Oral argument scheduled for June 12, 1995 in San Francisco is cancelled. We VACATE the order awarding attorneys' fees to the plaintiff-appellee and we REMAND to the district court for further proceedings consistent with Anderson v. County of Kern, 45 F.3d 1310 (9th Cir. 1995).

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By: /s/ Gwin Baptiste
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 28 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JERRY ANDERSON, et al.,	)	No. 94-15414
	)	
Plaintiff/Appellee,	)	D.C. No. CV-90-
	)	00205-GEB
vs.	)	
	)	
COUNTY OF KERN; CARL SPARKS, Sheriff,	)	
	)	
Defendants/Appellants.	)	ORDER

Before: HUG, ALARCON, and TROTT, Circuit Judges

Plaintiffs-Appellees' motion filed May 30, 1995 to set aside this court's order of May 22, 1995 is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 31 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JERRY ANDERSON; GLENNA BLAIR; TERRY DAVIS; JOHN WARDWELL; JESSE VASQUEZ, IRENE JAREZ;	)	No. 92-17040 No. 93-15019
Plaintiffs-Appellants-Cross-Appellees	)	D.C. No. CV-90-00205-GEB
v.	)	
COUNTY OF KERN; JOHN SMITH, Sheriff,	)	
Defendants-Appellees-Cross-Appellants.	)	ORDER

Before: POOLE, CANBY, and RYMER, Circuit Judges.

The motion of plaintiffs/appellants/ cross-appellees filed July 21, 1995 is GRANTED. Consideration of plaintiffs' application for attorney' fees on appeal pursuant to 42 U.S.C. § 1988 is hereby transferred to the district court. 9th Cir. R. 39-1.8.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 31 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JERRY ANDERSON; GLENNA BLAIR; TERRY DAVIS; JOHN WARDWELL; JESSE VASQUEZ, IRENE JAREZ;	)	No. 92-17040 No. 93-15019
Plaintiffs-Appellants-Cross-Appellees	)	D.C. No. CV-90-00205-GEB
v.	)	
COUNTY OF KERN; JOHN SMITH, Sheriff,	)	
Defendants-Appellees-Cross-Appellants.	)	ORDER

Before: POOLE, CANBY, and RYMER, Circuit Judges.

The Motion to Vacate Order filed by defendants/appellees/cross-appellants on August 8, 1995 is DENIED.